88-26

(1)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

EDWARD M. CARMOUCHE
Petitioner,

v.

AUSTER OIL & GAS, INC.
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

DAVID R. FROHN
Counsel of Record
A.J. GRAY, III
CARMOUCHE, GRAY & HOFFMAN
(A Professional Law Corporation)
P.O. DRAWER 2001
LAKE CHARLES, LA 70602
(318) 433-0355

QUESTIONS PRESENTED

1. Plaintiff sued petitioner and others under 42 U.S.C. § 1983 for placing theft tracing devices known as "microchips" in producing oil wells and associated equipment of which plaintiff was the operator, alleging that the placement constituted an unreasonable warrantless search and/or seizure of the wells and equipment. The equipment is located on the open range of a working ranch owned by one of the defendants named in the suit.

a) May the operator/plaintiff assert a constitutionally protected privacy interest in the wells and equipment even though located in an "open field?"

b) Alternatively, does the operator/ plaintiff have a "reasonable expectation of privacy" in the interior of the wells and equipment?

1) Does the operator/plaintiff have a "subjective expectation of privacy" even though the President of the operator corporation and a leading oil and gas law authority each testified at trial that they did not expect the interior of the wells or the equipment to remain private?

2) Even if a subjective expectation of privacy exists, is that expectation one which society should recognize as "reasonable," particularly in light

of the operation of the wells and equipment in the context of a highly regulated industry?

2. Is the placement of the microchips an unreasonable search and/or seizure of the equipment, even though consented to by the owner of the land on which the equipment was located and the owner of an undivided fraction of the oil being produced from the well?

3. May petitioner, attorney for the persons and corporations who ordered and authorized the search, be held liable for compensatory and/or punitive damages resulting from the search although he did not hire or recommend the hiring of the persons who implanted the microchips, did not order or control them, did not receive direct reports of their activities, and had no prior knowledge of when or where the microchips would be placed.

LIST OF PARTIES AND RULE 28.1 LIST

Appellants in the Court of Appeals were Matilda Gray Stream, her son Harold H. Stream, III, her family corporation M.G.S. Lake Charles, Inc., and her attorney Edward M. Carmouche. Appellee was Auster Oil & Gas, Inc.

The case against Matilda Gray Stream was dismissed by the Court of Appeals.

Edward M. Carmouche, attorney, was a separate appellant in the court below.

Auster Oil & Gas, Inc. was an appellant below solely to seek an increase in attorney's fees.

M.G.S. Lake Charles, Inc. and Harold H. Stream, III petitioned this Honorable Court for a Writ of Certiorari in this matter on April 7, 1988.

M.G.S. Lake Charles, Inc. has no parent companies, subsidiaries, or affiliates.

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In The

SUPREME COURT OF THE UNITED STATES

October 1987 Term

EDWARD M. CARMOUCHE,

PETITIONER.

v.

AUSTER OIL & GAS, INC.,

RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

THE PETITIONER, Edward M. Carmouche, respectfully prays that a writ of certiorari issue to review the opinion of the United States Court of Appeals for the Fifth Circuit, entered in the proceedings entitled Auster Oil & Gas, Inc. v. Stream on January 14, 1988, rehearing denied on March 8, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit of which Petitioner seeks review is reported at 835 F.2d 597. (App. C). The opinion of the District Court dismissing Respondent's petition for failure to state a claim is not reported. (App. G). A prior panel opinion reversing that dismissal and remanding for trial on the merits opinion is reported at 764 F.2d 381. (App. D). The District Court's judgment on the merits after jury trial is not reported. (App. E). The District Court's ruling on post trial motions is not reported. (App. D). The District Court's order regarding certain post trial motions and granting remittatures as to all defendants is not reported. (App. C). The Court of Appeals' denial of rehearing is not reported. (App. B).

JURISDICTION

This suit arises under 42 U.S.C. § 1983. Jurisdiction is conferred upon the District Court by 42 U.S.C. §§ 1331, 1343.

The Court of Appeals entered its opinion on January 14, 1988. (App. C). The timely petition for rehearing of petitioner Edward M. Carmouche was denied by that Court on March 8, 1988. (App. B).

Jurisdiction to review the judgment of the Court of Appeals is conferred upon this Court by 28 U.S.C. § 1254(1).

STATUTES INVOLVED

U.S. Const. Amend. IV. (App. A)

Civil Rights Act, 42 U.S.C. § 1983. (App. A).

La. Rev. Stat. Ann. § 30:4(B) (West 1975). (App. A).

La. Rev. Stat. Ann. § 31:7 and Comment thereto (West 1975). (App. A).

STATEMENT OF THE CASE

Respondent Auster Oil & Gas, Inc. ("Auster") filed this § 1983 action against Matilda Gray Stream ("Mrs. Stream"), her son Harold H. Stream, III ("Mr. Stream"), their family corporation M.G.S. Lake Charles, Inc. ("MGS"), their long-time attorney Edward M. Carmouche ("Carmouche"), and Louisiana State Trooper Al Martin ("Martin"). Auster alleged that the defendants unlawfully searched and seized several oil wells and associated equipment operated by Auster and claimed that these actions entitled it to relief under the Civil Rights Act, 42 U.S.C. § 1983.

Mrs. Stream owns the land upon which the wells and equipment are located; Auster operates the wells under a lease from Mrs. Stream. Pursuant to that lease, she

owns a substantial royalty interest in all production from all of the wells and an equity interest in production from some of them.

In the Summer of 1982, Louisiana law enforcement officials began to suspect Auster of stealing oil from the Stream property. The Louisiana State Police conducted an abortive undercover investigation. (Transcript of Trial on the Merits [hereinafter referred to as "Tr."] 179-84).

In early 1983, at the prompting of Officer Dan Dougherty of the Louisiana State Police Intelligence Section, State Police detectives resumed the investigation. This investigation brought to light telephoto photographs taken by the security chief of Cities Service Oil Company, the purchaser of the oil from the field. The photos showed what was

described as suspicious, irregular movement of oil to and from the field. (Tr. 762-64) Based on this evidence, the state police detectives attempted to arrange a "sting" operation in which they would purchase stolen oil. The operation fell through. (Tr. 766-67). At this juncture, the state police closed the investigation because of poor documentation and what appeared to be uncoordinated involvement by numerous other agencies, including the FBI. (Tr. 772-73).

At that time, Mrs. Stream requested (Tr. 10-11) that Carmouche, who knew of the law enforcement investigations, demand that Auster release the leases. (Trial Exhibit P-19). Auster declined after conducting its own investigation, which included administering voice stress tests to its employees--with, in at least

one case, suggestive results. (Tr. 291-97).

Following the closing of the Louisiana State Police investigation, Calcasieu Parish Assistant District Attorney, Wayne Frey, met with attorney Joe Mize of Carmouche's firm to discuss oil theft. The discussion centered on the difficulties of proving that a particular truckload or barrel of oil was stolen from the Stream lease. Frey emphasized that the Streams would have to overcome these problems before his office could prosecute. (Tr. 244-45).

In July 1983, the Louisiana State Police reopened its investigation with the understanding that the Streams had civil purposes in mind, i.e., canceling the Auster leases for non-payment of royalties. (Tr. 920-21).

On July 28 and August 29, 1983, Mize discussed the oil tracing problem with Louisiana State Police Lt. Moreau. After discussing chemical and radioactive tracers, they settled on employing "microchips" (tiny plastic-coated pieces of microfilm inscribed with information regarding the source of the oil). (Tr. 923-24).

Moreau agreed to use the Stream's "microchip evidence" provided that the operation met three criteria: preservation by an agent of the evidence, traceability of the microchips, and authority to insert them on the property. (Tr. 926).

On a Sunday in September, 1983, Louisiana State Police Detective Al Martin and agents hired by the Streams met in Lake Charles. Mize asked Carmouche to bring the microchips to Detective Martin

at that meeting in order to preserve the chain of evidence. Carmouche did as asked; after delivering the devices, he never opened the box. (Tr. 656). Carmouche had no further contact with the microchips, the Louisiana State Police, or the Stream agents. (Tr. 657)

With defendant Martin taking photographs (Trial Exhibit A-60), employees and agents of the Streams placed microchips into tanks, pits, and the flow line leading from each of three producing wells, F-4, J-8, and M-1. They placed a screen to collect the microchips in a sales line owned by Cities Service. The microchip placement consisted of turning off the electricity to the pump, opening a plug in the flow line, and inserting the microchips, a process taking approximately 5-10 minutes at each well and 45 minutes total in the field. (Tr. 544).

Auster routinely performs a similar procedure, without the microchips, to clear the flow line chokes when they clog with paraffin. (Tr. 53-56)

The microchips clogged the chokes of the M-1 and J-8 wells. The parties stipulated that the cost to repair the J-8 well was $2,845.50 and to clean up an oil spill around the M-1, $590.00.

Auster filed suit on December 20, 1983 in the United States District Court for the Western District of Louisiana against MGS and Martin. On April 17, 1984 the District Court dismissed Auster's complaint under Fed. R. Civ. P. 12(b)(6), holding that Auster as a matter of law could not have a reasonable expectation of privacy in the interior of the wells and equipment. (App. G). Auster appealed the dismissal and the United States Court of Appeals for the Fifth

Circuit reversed and remanded for trial on the merits. Auster Oil & Gas, Inc. v. Stream, 764 F.2d 381 (5th Cir. 1985). D) The Court of Appeals ruled that the presence vel non of a reasonable expectation of privacy was a question of fact to be decided at trial.

After this remand and more than twenty-four months after suit was filed, Auster added Mr. Stream and Carmouche as additional defendants.

The District Court held trial before a jury which, on April 10, 1986, returned a verdict against all defendants except Martin, whom it exonerated based on good faith immunity. The jury awarded compensatory damages of $250,000 and awarded punitive damages in the following amounts: $500,000 against Mrs. Stream, $500,000 against MGS, $1,500,000 against

Mr. Stream, and $2,500,000 against Carmouche. The District Court entered judgment accordingly (App. E) but later subjected these awards to massive remittitures. (App. C).

Stating that the jury had "run amok," the Court of Appeals set aside all damages as to all defendants, dismissed Mrs. Stream from the case for lack of evidence that she participated in the microchip operation, upheld liability as to the remaining defendants, and remanded for a new trial limited to the quantum of compensatory and punitive damages. Auster Oil & Gas, Inc. v. Stream, 835 F.2d 597 (5th Cir. 1988). (App. C). The Court of Appeals denied various petitions for rehearing of this decision on March 8, 1988. (App. B)

MGS and Mr. Stream have sought writs of certiorari from this Court, primarily

addressing an alleged conflict of interest on the part of trial counsel and the scope of the Court of Appeals' remand. Stream v. Auster Oil & Gas, Inc., No. 87-1664, Petition for Certiorari dated May 4, 1988. Carmouche now petitions this Honorable Court to review the Fourth Amendment aspects of the decision of the Court of Appeals and to exonerate him from liability in this matter.

REASONS FOR GRANTING THE WRIT

I.

The judgment below that Auster had a constitutionally protected privacy interest in the interior of the wells and equipment which it operated conflicts with the decisions of this Court.

The court below committed fundamental error in elevating a comparatively minor intrusion into oil field production equipment, in which any privacy interest is tenuous at best, into a violation of

Auster's civil rights. The Court of Appeals has allowed Auster to convert a trivial state law trespass claim into a multi-million dollar tort of constitutional dimensions. In so doing, the court below disregarded the teachings of this Court in its touchstone Fourth Amendment ruling:

> [T]he Fourth Amendment cannot be translated into a general constitutional 'right to privacy.' That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all. Other provisions of the Constitution protect personal privacy from other forms of governmental invasion. But the protection of a person's general right to privacy--his right to be let alone by other people--is like the protection of his property and of his very life, left largely to the law of the individual states.

Katz v. United States, 389 U.S. 347, 350-51 (1967).

A. Auster can assert no constitutionally protected privacy interest in the wells and equipment because they are located in an "open field."

Uncontradicted and overwhelming evidence adduced at trial, including photographs of the site, unquestionably established that Auster conducted its activities out of doors in an open field and on a working ranch owned by Mrs. Stream. The testimony at trial established that the property was "wide-open range." (Tr. 340, 488-489, 814, 922) "It wasn't even enclosed by a fence. It was just there." (Tr. 814-815) See also, Trial Exhibit D-4 (photographs of the well site).

Since this Court's ruling in Hester v. United States, 265 U.S. 57 (1924), it has been clear that the Fourth Amendment's protection does not extend to the open fields:

> The special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers and effects' is not extended to the open fields. The distinction between the latter and the house is as old as the common law.

265 U.S. at 59 (emphasis added).

The open fields doctrine has found modern expression in Oliver v. United States, 466 U.S. 170 (1984). There, this Court concluded that searches conducted in open fields do not fall within the protections of the Fourth Amendment.

> [T]he rule of Hester v. United States, supra, that we reaffirm today, may be understood as providing that an individual may not legitimately demand privacy for activities conducted out of doors in fields, except in the area immediately surrounding the home.

466 U.S. at 178 (emphasis added).

Auster's equipment was not near any home. The closest home was that of the Streams, who consented to the operation. Unlike Oliver, Auster had not posted "no

trespassing" signs around the field. At most, Auster had erected signs containing both its name and that of Mrs. Stream. (P-12) No constitutional policy is advanced by affording Fourth Amendment protection to Auster's activities. As this Court observed:

> Open fields do not provide the setting for those intimate activities that the Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities, such as the cultivation of crops, that occur in open fields. Moreover, as a practical matter these lands usually are accessible to the public and the police in ways that a home, an office or commercial structure would not be. . . . . For these reasons, the asserted expectation of privacy in open fields is not an expectation that "society recognizes as reasonable."

466 U.S. at 179 (emphasis added) (footnote omitted).

Courts of Appeal have applied Oliver consistently, overruling assertions of

Fourth Amendment rights in a range of open fields contexts: U.S. v. Fahey, 769 F.2d 829 (1st Cir. 1985) (gold mine); U.S. v. Marbury, 732 F.2d 390 (5th Cir. 1984) (gravel pit); U.S. v. Hoskins, 735 F.2d 1006 (6th Cir. 1984) (marijuana garden).

Petitioners vigorously asserted an open fields defense before the District Court and the Court of Appeals. Yet, in its discussion of the Fourth Amendment aspects of the case, the Court of Appeals did not even address the open fields issue. (App. B at 9-12).

As this Court recognized in Oliver, the Fourth Amendment rests upon an historical foundation--the American tradition of abhorrence to governmental intrusions into our homes and the privacy of our lives. 466 U.S. at 178-81. When

the Court of Appeals extended constitutional protection to oil wells and associated equipment operated by Auster on an open, working ranch owned by the Streams, it built those protections on ground far removed from traditional Fourth Amendment foundations. This Court should instruct the Fifth Circuit to confine itself to building on the ground which the Framers, History, and this Court have prepared for it.

B. Even if the open fields doctrine is held inapplicable to the equipment and wells, the microchip placement did not constitute a § 1983 violation because Auster has no reasonable expectation of privacy in the wells and equipment.

The per se rule of Hester and Oliver mandates that this Court hold that, because the wells are located in an open field, Auster is barred a priori from asserting a constitutionally protected privacy interest in them. If, however,

this Court should hold that the open fields doctrine does not apply here, then it should hold under the facts of this case that Auster lacked a reasonable expectation of privacy in the equipment.

Any discussion of whether a Fourth Amendment intrusion has taken place must begin with this Court's analysis in Katz v. United States, 389 U.S. 347 (1967). Katz focuses on privacy, not trespass. As one commentator noted:

> The crux of Katz and its seminal contribution to modern fourth amendment analysis is its abandonment of Olmstead's [v. United States, 277 U.S. 438 (1928)] emphasis on physical intrusion and trespass in favor of the test . . . that for an intrusion to be a search "a person [must] have exhibited an actual (subjective) expectation of privacy . . . and the expectation of privacy [must] be one that society is prepared to recognize as 'reasonable.'"

Note, Katz and Dogs: Canine Searches and the Fourth Amendment, 44 La. L. Rev.

1093, 1101 (1984) quoting Katz, 389 U.S. at 361 (Harlan, J., concurring).

In other words, absolutely irrespective of whether any physical trespass has taken place, there is no Fourth Amendment intrusion unless 1) the the person searched exhibits an actual expectation that the place searched would remain private and 2) society recognizes that expectation as a reasonable one. See Oliver, 466 U.S. at 177; Kimmelman v. Morrison, 91 L.Ed. 2d 305 (1986); Rakas v. Illinois, 439 U.S. 128, 143-44 (1978); U.S. v. Kovac, 795 F.2d 1509 (9th Cir. 1986); U.S. v. McHugh, 769 F.2d 860 (1st Cir. 1985); U.S. v. Army, 767 F.2d 1113, 1125 (5th Cir. 1985); U.S. v. Gray, 751 F.2d 733 (5th Cir. 1985).

1. Auster has exhibited no subjective expectation of privacy in the wells.

The threshold issue is whether Auster actually expected the interior of its wells and equipment to remain private; absent that expectation, all further Fourth Amendment analysis is precluded and the inquiry is closed--there is no search. Rakas, 439 U.S. at 143-44.

The evidence adduced at trial shows without question that Auster utterly lacked the requisite expectation.

John A. Hogan, the President of Auster and a witness who might be expected to couch his testimony in terms as favorable as possible to Auster, testified flatly that he had no expectation of privacy in the wells and flow lines:

> Q: But you did not expect either the content, the location or where things [the oil] were moving to be a private matter to Auster?

A: No. It was obvious what they were.

(Tr. at 45)

Louisiana State University Law Professor Thomas Harrell, Auster's expert, agreed:

Q: So all of these reasonable expectations that Auster would have, that is that no one would tamper with the equipment or close valves, those are expectations in property interest and property rights, are they not?

A: I guess you could say that. I'm not sure. They are contractual as well as property. If you want to be technical.

Q: They are not expectations of privacy or secrecy?

A: Oh, no, oh, no. Not, not, no. I'm sure with Ms. Streams consent, I could go out and look at Auster's oil wells and things. And I don't think they could object.

(Tr. 888) (emphasis added).

Professor Harrell's testimony is crucial. He makes it clear that, while an

oil well operator has certain state law expectations that his equipment will remain free from tampering, these expectations do not rise to the level of an expectation of privacy or secrecy.

The Court of Appeal found that Auster had a reasonable expectation of privacy because Auster had state law expectations that the Streams would not tamper with its equipment. (App. B at 9-11). In spite of the testimony that these expectations were of freedom from interference rather than of privacy or secrecy, the Court of Appeals found that violation of these expectations constituted a Fourth Amendment violation.

This ruling flies in the face of this Court's ruling in U.S. v. Karo, 468 U.S. 705 (1984), a case involving a "beeper," a device which certainly presents a greater threat to privacy than a

microchip. Karo held that, while the monitoring of the beeper's transmissions was a Fourth Amendment violation, its placement--while a technical trespass--was not. 468 U.S. at 712-17.

Rakas stands for the proposition that constitutional privacy invasions result from "conveying of information which [the person subjected to the search] wishes to keep private." 468 U.S. at 712. If no information is conveyed, then the Fourth Amendment is not invoked.

In the case at bar, the microchips clogged the chokes of the wells. The Streams were unable to trace the flow of oil; therefore, the microchips revealed no information which Auster may have wished to keep private.

The Court of Appeals has found a Fourth Amendment violation in the infringement of state law rights resulting from the insertion of the microchips rather than in the violation of a privacy interest resulting from their monitoring. Rakas clearly forbids such a holding.

The Court of Appeals confused state law property and contractual rights with federal constitutional rights. This Court should grant Certiorari to impress on the courts below that the Fourth Amendment provides a remedy for invasions of constitutional privacy interests, not for mere trespass and property damage.

2. Even if Auster did have a subjective expectation of privacy regarding its wells and flow lines, that expectation is not one which society would recognize as reasonable.

Auster's operation of the wells occurred in the context of the Oil and Gas

Industry, an area of economic endeavor which Louisiana subjects to pervasive and comprehensive regulation. In light of this regulatory environment, even if an oil field operator did entertain an expectation of privacy regarding his operations, this expectation would simply not be reasonable.

The Commissioner of Conservation of Louisiana possesses extraordinary powers to intrude upon Auster's premises. This power includes the authority to "to examine properties . . . [and] to examine, survey, check, test and gauge oil and gas wells, tanks, refineries and modes of transportation." La. Rev. Stat. Ann. § 30:4(B) (West 1975).

Moreover, courts have long recognized the Commissioner's authority to enter and inspect oil producing properties and equipment. Wheeler v. Cosden Oil &

Chemical Co., 734 F.2d 254, 257 (5th Cir.), modified on reh'g., 744 F.2d 1131 (5th Cir. 1984); O'Meara v. Union Oil Co., 33 So.2d 506, 508 (La. 1947). Auster cannot expect these matters to remain private.

The Court of Appeal, in rejecting these contentions, expressly relied on, indeed claimed to be "bound" by the prior panel opinion. (App. B at 10, 12). This reliance is misplaced in that the prior panel ruling issued under the "sanctuary" of Conley v. Gibson, 355 U.S. 41 (1957) and assumed as true all factual allegations contained in Auster's complaint. (App. F at 13-16).

The prior panel ruling, in turn, concluded that Louisiana law prohibited the Streams from acting to "interfere with Auster's operations." (App. F at 35).

Again, the Court of Appeals has confounded Auster's uncontested statutory and contractual right to conduct its operations free from interferance with a purported constitutional right to keep secret the routes taken by oil through its equipment. This Court should dispell the Fifth Circuit's confusion. (App. F. at 25-40).

Therefore, it is inescapable that Auster did not have a subjective expectation of privacy and, even if it did, that this expectation is not one which society is prepared to recognize as reasonable.

The Court of Appeal also held that the microchip placement constituted a Fourth Amendment violation because it constituted a "not insubstantial" interferance with Auster's "possessory" interest in the equipment. (App. B at 11). Nowhere has this Court adopted a per se

rule that any "not insubstantial" interferance with a "possessory" interest infringes upon an interest protected by the Fourth Amendment. Instead, the rulings of this Court have always, if often implicitly, imposed violation of a protected privacy interest as a prerequesite for the finding of any Fourth Amendment violation, including seizures. See, e.g., U.S. v. Place, 462 U.S. 696, 705 n.6 (1983); Payton v. New York, 445 U.S. 573, 587-88 (1980); G.M. Leasing Corp. v. United States, 429 U.S. 338, 351 (1977).

II.

Even if Auster enjoyed a constitutionally protected interest in the equipment and wells, the microchip placement was not an unreasonable search or seizure because it was conducted with Mrs. Stream's consent.

It is undisputed that Mrs. Stream, or her agents, consented to the microchip placement. Carmouche contends that this

consent renders the microchip placement a reasonable search.

Because Mrs. Stream owned the land and because she owned a share of the oil flowing through the equipment, she possessed authority to consent to the microchip placement. No one disputes Mrs. Stream's ownership of the Stream Ranch, the land upon which the equipment was located. Furthermore, there can be no dispute that Mrs. Stream or her family corporation owned a substantial fraction of the oil. See Trial Exhibit D-5 (agreements between Mrs. Stream and Auster recognizing that she and/or MGS own at least twenty-five percent of the production from the subject wells).

Even without these agreements, under general principles of law Mrs. Stream is the owner of her proportionate share of the oil once it reaches the surface

(where the tracing devices were placed) and enters the flow line. As a mineral lessor, Mrs. Stream owns a fraction of oil produced from the lease wells. Commissioner of Internal Revenue v. Gray, 159 F.2d 834 (5th Cir. 1947) (case involving lands belonging to Mrs. Stream); Texas Co. v. Fontenot, 200 La. 753, 8 So.2d 689, 692 (1942). This ownership vests when the oil is severed from the ground, that is, at the well head. La. Rev. Stat. Ann. § 31:7 [La. Min. Code art. 7] (West 1975) and comment thereto.

It is uncontradicted that the wells were opened and the microchips inserted in the oil stream at a point beyond the well head. (Tr. 338) In effect, therefore, Mrs. Stream was searching equipment through which her own oil was flowing.

Mrs. Stream's ownership of the land and of much of the oil empower her to

consent to the placement. While a landlord may not generally consent to a search of the leased premises, Chapman v. U. S., 365 U. S. 610 (1961); Stoner v. California, 376 U.S. 483 (1964), this court has validated searches consented to by a person "who possessed common authority over or other sufficient relationship to the premises or effects sought to be inspected." United States v. Matlock, 415 U.S. 164, 172 (1974). This authority derives, not from the consenting party's property interest, but from the mutual use of the subject property by persons having joint access or control for most purposes. 415 U.S. at 172 n.7.

Mrs. Stream may consent to the microchip placement, then, because she enjoyed mutual use of the equipment and had access to it for most purposes. Because

much of the oil flowing through the equipment belonged to her, she and Auster mutually used the equipment to produce and transport their oil. Because her lease with Auster specifically granted her the right of "access to the premises at all times . . . ." (Trial Exhibits P-1 through P-4), she had access to the property for most purposes.

Respondent raised the consent issue at trial and before the Court of Appeals. The Court of Appeals never addressed the consent issue. (App. B at 9-12).

The clear meaning of Matlock, as well as a common-sense understanding of Mrs. Stream's rights regarding the equipment located on her property and producing her oil, dictate that Mrs. Stream be allowed to consent to the minimally intrusive microchip operation. To hold otherwise would require this Court to engage in the

sort of "metaphysical subtleties" which it eschewed in Frazier v. Cupp, 394 U.S. 731, 740 (1969).

III.

Even if the microchip placement is held to be an unreasonable search of the equipment, Carmouche may not be held legally responsible for the consequences of the placement.

The Court of Appeals, in most cursory fashion, held that Carmouche was personally involved in the microchip placement:

> He [Carmouche] delivered the microdots to the agents and state police on the day they inserted them into the wells. There was evidence that Carmouche was routinely informed by Mize of the planning of the operation and of its potential legal consequences. Furthermore, a major defense of the Streams at trial was predicated on the theory that they were acting at all times on advice of counsel.

(App. B at 20-21).

The record shows quite the reverse. Carmouche's only involvement was to

deliver the microchips, without any specific knowledge of how they were to be put to use. (Tr. 656-57). He had no direct responsibility for any part of the alleged Fourth Amendment violation. He did not direct or plan the placement. (Tr. 657) He knew none of the details of the planned placement and did not know that it would require opening the equipment. (Tr. 649) He did not know whether the state police had obtained a warrant. (Tr. 640)

The trial testimony read as a whole shows that Carmouche was in possession of very little information regarding the planned placement, exercised no control over these events, and lacked enough knowledge about the affair even to suspect that there might be a constitutional invasion. There is certainly no evidence

that Mize informed Carmouche of the progress of the oil theft investigation on anything approaching a "routine" or complete basis.

The Court of Appeals may not hold Carmouche liable simply because the Streams asserted reliance on "counsel." It would be absurd to hold Carmouche liable for any such reliance, absent evidence that the Streams relied specifically on advice from Carmouche, when "counsel" is a law firm then comprising approximately fifty attorneys located in three cities and when Carmouche is an older member of that firm who has somewhat restricted his activities.

Just as Carmouche's own limited involvement will not support any § 1983 liability, he may not be held liable for the actions of others in this case. He

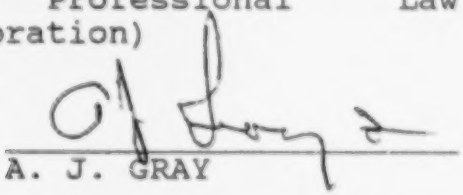
cannot be held responsible for the actions of Mize or of the persons in the Stream's employ who participated in the placement because, as this Court has held, § 1983 "will not support a claim based on a respondeat superior theory of liability." Polk County v. Dodson, 454 U.S. 312, 325 (1981).

Carmouche, likewise, cannot be held liable for failure to supervise Mize and the unless Carmouche himself acted under color of state law and unless any failure to supervise was the proximate cause of the alleged civil rights violation. Monell v. Dept. of Social Servs., 436 U.S. 658 (1978); Polk County, supra; Rizzo v. Goode, 423 U.S. 362 (1976). The Court of Appeal did not ground liability on either of these bases.

Carmouche is certainly not a public official but merely a private citizen and attorney at law. He cannot be held liable for the alleged infringement by others of Auster's constitutional rights. Carmouche must be exonerated.

Respectfully submitted,

CARMOUCHE, GRAY & HOFFMAN
(A Professional Law Corporation)

BY: 
A. J. GRAY

BY: 
DAVID R. FROHN

P.O. Drawer 2001
Lake Charles, LA 70602
318-433-0355

ATTORNEYS FOR PETITIONER,
EDWARD M. CARMOUCHE

APPENDIX

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-4584

AUSTER OIL & GAS, INC.,

Plaintiff-Appellee
Cross-Appellant

versus

MATILDA GRAY STREAM, ET AL.,

Defendants-Appellants
Cross-Appellees.

Appeal from the United States District Court for the Western District of Louisiana

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ON PETITIONS FOR REHEARING

(March 8, 1988)

Before RUBIN, GARZA AND JONES, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petitions for rehearing filed in the above entitled and numbered cause be and the same are hereby DENIED.

ENTERED FOR THE COURT:

/s/ EDITH H. JONES 3/3/88
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 86-4584

AUSTER OIL & GAS, INC.,

Plaintiff-Appellee,
Cross-Appellant,

versus

MATILDA GRAY STREAM,
ET AL.,

Defendants-Appellants,
Cross-Appellees.

Appeals from the United States District Court for the Western District of Louisiana

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O R D E R :

IT IS ORDERED that the motion of appellants Harold H. Stream, III and MGS Lake Charles, Inc. for leave to file reply to Auster's response to the

Stream's petition for rehearing is GRANTED.

/s/ EDITH H. JONES 3/8/88

United States Circuit Judge

APPENDIX B

AUSTER OIL & GAS, INC.,
Appellee Cross-Appellant,

Matilda Gray STREAM, Harold H. Stream, III, M.G.S Lake Charles, Inc., and Edward M. Carmouche,
Defendants-Appellants Cross-Appellees.

No. 86-4584.

835 F.2d 597 (5th Cir. 1988)

United States Court of Appeals,
Fifth Circuit.

January 14, 1988.

Appeal from the United States District Court for the Western District of Louisiana.

Before RUBIN, GARZA, and JONES, Circuit Judges:

EDITH H. JONES, Circuit Judge:

For the third time, this action for damages by reason of an unconstitutional search and seizure of property appears before us. A prior panel opinion, Auster Oil & Gas, Inc. v. Stream, 764 F.2d 381 (5th Cir.1985), reversed the dismissal of

the plaintiff's complaint for failure to state a claim, and the case was remanded for a trial on the merits. At trial, the jury exonerated the defendant state trooper on the grounds of qualified immunity but found that defendants Matilda Gray Stream ("Mrs. Stream"), Harold H. "Spook" Stream ("Spook Stream"), M.G.S. Lake Charles, Inc. ("M.G.S."), and their attorney Edward M. Carmouche ("Carmouche") had violated the fourth amendment rights of Auster Oil & Gas, Inc. ("Auster"). The jury awarded Auster $250,000 actual and a total of $5,000,000 punitive damages. The district court remitted $4,350,000 of the punitive damages, and awarded Auster over $[illegible],000 in attorneys' fees and expenses pursuant to 42 U.S.C. § 1988. The Streams, M.G.S., and Carmouche now appeal from the judgment of the district court, and Auster cross-appeals certain aspects

of the award of attorneys' fees. We reverse and render in part, remand for a new trial on damages and affirm in part.

The background and facts of this case are set out fully in the prior panel opinion, 764 F.2d at 384-86. To summarize briefly, Mrs. Stream and M.G.S. granted Auster and other lessees an oil, gas and mineral lease on lands in Calcasieu Parish, Louisiana, in 1971, retaining significant royalty interests. Auster was designated as operator of the properties. In the early 1980's allegations of oil thievery surfaced, and the Louisiana state police began a criminal investigation into whether Auster or anyone else had been stealing oil from the leases. Trooper First Class Al Martin, assigned to the case, was brought into contact with Carmouche, who was the attorney representing M.G.S. and

the Streams. Shortly afterward Mrs. Stream and her son Spook Stream, authorized Carmouche to investigate Auster's operations.

In April 1983, Carmouche demanded that Auster cancel its leases, accusing Auster of operating a network of secret pipelines and tanks through which it was illegally siphoning off oil. Auster denied the allegations. Although the state police closed their investigation in July 1983 without bringing charges, Carmouche continued his own inquiries. After several meetings, Carmouche, his investigators, and Trooper Martin devised a high-tech surveillance plan to determine whether oil was being stolen from the leases.

The plan called for inserting plastic capsules containing microfilm, called microchips or microdots, into pipelines

near the wellheads, and placing screens in the pipelines at the point where they left the Stream's lease property. In theory, the flow of the oil would carry the microdots through the pipeline and into the screens, where they would be recovered. If a substantial number of microdots failed to appear in the screens, this could mean that Auster was diverting oil from the pipelines, and Carmouche's suspicions of theft would have been in some measure substantiated.

On September 25, 1983, several of Carmouche's agents, one of whom was Joe Mize, his son-in-law and law partner, executed this plan while Martin and other Louisiana state police officers served as lookouts. No search warrant had been obtained or sought.

Unfortunately for defendants, their sophisticated technology failed in its

appointed task. The microdots got stuck in the wellheads and pipelines, damaging Auster's equipment, causing leaks of several barrels of oil, and, according to Auster, damaging the underground formations to such an extent that all production from one well was lost. When Auster discovered the cause of these problems, it demanded compensation from the Streams and sought an injunction in state court to prevent further intrusions.

This lawsuit was filed in December 1983, alleging that Mrs. Stream, M.G.S., and Trooper Martin had conspired, inter alia, to conduct an unlawful search and seizure in violation of the fourth amendment. It also asserted that the operation was instigated, not to investigate reports of thievery, but for the purpose of breaking Auster's leases

so the Streams could use the property for other purposes. In April 1984, the district court granted Mrs. Stream and M.G.S.'s motion to dismiss for failure to state a claim, concluding that Auster had failed to allege the state action requisite for a § 1983 action. The court also held that because the leases entitled the private defendants to investigate Auster's operations, there had been no constitutional violation. Auster sought interlocutory review of this dismissal, which this court refused.

Auster immediately attempted to amend its complaint to cure the pleading defects and moved for reconsideration of the district court's dismissal of the prior complaint. Alternatively, it sought to have the district court enter a final judgment regarding Mrs. Stream and M.G.S. to facilitate an interlocutory

appeal. The court denied the motions to amend and to reconsider, but it did enter the requested final judgment.

Our prior panel held that Auster's allegations that Mrs. Stream and M.G.S. had acted "in concert" with Trooper Martin were sufficient to support a claim of state action under 42 U.S.C. § 1983. The decision went on to hold that the complaint adequately stated a claim under § 1983 for a violation of the fourth amendment, and it rejected arguments that the lease agreements or provisions of the Louisiana Mineral Code authorized the operation. Finally, the court held that Auster should have been allowed to amend its complaint to cure the pleading defects. The case was remanded for trial.

Back in the district court, Auster amended its complaint not only to cure

the prior defects but also to add Carmouche and Spook Stream as defendants. Except as to Trooper Martin, the jury found liability with a vengeance. Actual damages of $250,000 were assessed against the private defendants in solido, and the jury imposed punitive damages of $2,500,000 against Carmouche, $1,500,000 against Spook Stream, $500,000 against M.G.S., and $500,000 against Mrs. Stream. The district court reduced the punitive damages to $500,000 against Carmouche, $100,000 against Spook Stream, $40,000 against M.G.S., and $10,000 against Mrs. Stream. This vigorously contested appeal followed.

I. Fourth Amendment Violation

Appellants re-assert their defense, raised in the prior appeal of this case, that no unlawful search or seizure occurred because Auster had no reasonable

expectation of privacy in the production operations, well bore, pipelines or production equipment on the Ged Lease. Our prior panel held that, if Auster had a reasonable expectation of privacy, the conduct alleged on the part of defendants would be unconstitutional. The panel specifically rejected assertions that § 31:177 of the Louisiana Mineral Code or the defendants' lease agreement with Auster would vitiate the reasonableness of Auster's expectations. 764 F.2d 390-91. At trial, Auster introduced evidence supporting its contention that it has a reasonable expectation of privacy in conducting lease operations without surreptitious interference by appellants. An expert witness confirmed that under the various agreements between the appellants and Auster, appellants were not authorized to conduct the non-consensual microdot operations. The

parties stipulated that Auster had an exclusive right to operate the production facilities and equipment. It was further uncontested that the defendants' operation interfered with Auster's production activities. There was evidence that the interference with Auster's "possessory" interest was not insubstantial, involving the dismantling of choke assemblies on the wells with resulting damage to Auster's equipment and permanent loss of all production from the J-8 well. The fact that the seizure proceeded without a warrant necessitates a presumption of unreasonableness. United States v. Karo, 468 U.S. 705, 718, 104 S. Ct. 3296, 3304, 82 L.Ed.2d 530 (1984). In sum, there was sufficient evidence that Appellants engaged in an unreasonable search and seizure, as defined by the prior panel, and thus the jury could properly find a violation of

the fourth amendment. We find no meaningful distinction between the arguments advanced by Appellants on the prior appeal to qualify Auster's expectation of privacy, and those they now assert. We are bound by our prior rejection of those arguments.

II. *Qualified Immunity*

Appellants assert that they should have been allowed the defense of qualified immunity as a matter of law, because, as private parties acting under color of state law, they are entitled to the same immunity as state officials performing discretionary functions. Folsom Investment Co., Inc. v. Moore, 681 F.2d 1032, 1037 (5th Cir.1982). After careful review of the record, we are unable to conclude that the defendants raised or preserved a qualified immunity defense in the trial court, and we must

decline to review this issue. Nissho-Iwai Co. v. Occidental Crude Sales, 729 F.2d 1530, 1549 (5th Cir. 1984). Unlike Trooper Martin, whose defense of qualified immunity permeates the pretrial record and was submitted to the jury,[1] the appellants made no mention of it in the pretrial order, or in oral or written motions for directed verdict,nor did they request jury issues covering this affirmative defense.[2] Appellants lodged no objection to the

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1. We intimate no opinion concerning whether or not qualified immunity was properly an issue for the jury.

2. Appellants' proposed issue No. 23, contrary to their contention in this court, sought jury consideration of derivative immunity, based on Guidry v. Ford, 431 F.2d

court's charge concerning this issue. The issue was not squarely posed until the filing of appellants' motion for new trial, which was too late. Fed. Rules Civ. Proc. 16(e), 50(b), 51. Id. Thus, the trial court lacked a fair opportunity to address the qualified immunity defense and pose it to the jury, as it did in Trooper Martin's case.

We do consider on appeal an issue not properly raised below but only if it involves a pure legal question and our

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660, 664 (5th Cir. 1970), overruled by Sparks v. Duval County Ranch Co., Inc., 604 F.2d 976 (5th Cir. 1979), cert. den., 449 U.S. 1021, 101 S. Ct. 588, 66 L. Ed.2d 483. This issue is legally distinct from that of qualified immunity. Folsom, 681 F.2d at 1037.

failure to consider it would result in a miscarriage of justice. Nisshow-Iwai Co. v. Occidental Crude Sales, 729 F.2d 1530, 1549 (5th Cir. 1984) Had appellants timely asserted the defense of qualified immunity, subsidiary questions of fact might have arisen, such as what information they possessed that might have led a reasonable person to think that a warrantless search and seizure was lawful. Anderson v. Creighton, ___ U.S. ___, 107 S. Ct. 3034, 3040, 97 L. Ed.2d 523 (1987). Because a qualified immunity defense might have involved factual questions and because appellants' failure to assert the defense until after trial deprived the district court of a fair opportunity to address the issue, we decline to review the issue on appeal. Id.

III. *Vicarious Liability*

It is well-settled that § 1983 liability cannot be based solely on vicarious liability or respondeat superior. Monell v. Dept. of Social Services, 436 U.S. 658, 691, 98 S. Ct. 2018, 2036, 56 L. Ed.2d 611 (1978); Kline v. North Texas State University, 782 F.2d 1229, 1234 (5th Cir. 1986); Thibodeaux v. Arceneaux, 768 F.2d 737, 739 (5th Cir. 1985). The Streams contend that there was no evidence that they actually participated in the planning or execution of the operation, and thus the jury incorrectly found them liable under some notion of vicarious liability for the acts of their attorney Carmouche. For himself, Carmouche contends that there was no evidence in the record linking him personally to the planning or execution of the microdot operation, and thus he

cannot be held liable for the acts of his agents.

Appellants' contention is clearly correct insofar as it applies to Mrs. Stream. We find no evidence in the record that Mrs. Stream was involved in or even knew of the microdot operation before it occurred, and Auster apparently concedes this fact. However, appellee argues that Mrs. Stream's liability flows from her *failure* to act, in not adequately supervising her son and Carmouche. This theory of § 1983 liability was discussed by this court in Kline, where we held that liability will be visited on a non-acting superior only when he has a legal duty to act to prevent the misdeeds of his agents or subordinates, and where his failure to act or supervise amounts to gross negligence or deliberate indifference.

782 F.2d at 1235. In the case at bar, the record indicates no such duty to act on the part of Mrs. Stream. She was not involved in the day-to-day operations of her mineral interests, and there is no evidence that she knew of the microdot operation before the fact. Furthermore, there is no indication that entrusting her business affairs to her son and Carmouche was in any way negligent or the result of deliberate indifference.

However, there is sufficient evidence in the record to support the jury's finding on Spook Stream's liability. It was not disputed that Carmouche had informed Stream of the microdot operation before the fact, that Stream had signed a check used to purchase the microdots, and that he had signed an agreement holding harmless one of the participants in the operation. There is evidence in the

record suggesting that Spook Stream may have known that Mize, Carmouche's son-in-law and an attorney in his firm, had concluded in a pre-operation memorandum that the participants could be liable for damages that resulted from the operation. Reviewing all this evidence in the light most favorable to Auster, we find that the jury could have properly concluded that Spook Stream acquiesced in Carmouche's plans and was directly involved in the operation. As a result, his assertion that the jury improperly based his culpability solely on vicarious liability is groundless.[3]

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3. Because the record also shows that Stream was acting at all material times in his capacity as either vice-president and/or secretary of M.G.S., his actions constitute the official imprimatur needed to hold

There also is sufficient evidence to find that Carmouche was personally involved in the microdot operation. He delivered the microdots to the agents and state police on the day they inserted them into the wells. There was evidence that Carmouche was routinely informed by Mize of the planning of the operation and of its potential legal consequences. Furthermore, a major defense of the Streams at trial was predicated on the theory that they were acting at all times

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the corporation liable under § 1983. See White v. Washington Public Power Supply System, 692 F.2d 1286, 1290 (9th Cir.1982) (corporation can be liable under § 1983 if there is a showing of official sanction of the conduct or practice at issue).

on the advice of counsel. For Carmouche now to claim that there was no evidence that he was involved in or knew anything of the actual operation is most unconvincing.

IV. *Stachura Error*

The district court instructed the jury that, in addition to property damages and compensation for the lost use of the facilities, Auster could "recover, if proven, damages for the violation of [its] constitutional rights." After the verdict, the Supreme Court held that such an instruction was erroneous. Memphis Community School District v. Stachura, 477 U.S. 299, 106 S. Ct. 2537, 2543-45, 91 L. Ed.2d 249 (1986). When the Stachura decision was brought to the attention of the district court, the court held that the instruction disfavored in Stachura was

distinguishable from the one at bar, and that any error in the instruction was harmless because the jury's verdict on actual damages was otherwise supportable by the evidence.

We disagree with these conclusions. In Stachura, the Supreme Court reiterated that § 1983 is designed to compensate persons for actual injuries caused by the deprivation of constitutional rights. Consequently, a party may not be compensated solely for the bald deprivation of a constitutional right.[4]

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4. We emphasize that this analysis is limited to actual damages. A party may, in an appropriate case receive punitive damages in a § 1983 action even though he has incurred no or minimal actual

damages. See Stachura, 106 S. Ct. at 2542 n.9.

106 S. Ct. at 2543. The clear import of the district court's instruction in the case at bar was that the abstract violation of a constitutional right was compensable. Such an instruction is legally indistinguishable from that in *Stachura:* both instructed the jury that they could award actual damages for the intrinsic value of the deprivation of a constitutional right. The instruction was thus erroneous.

Auster contends, however, that there was evidence to support an award of no less than $250,000 actual damages, from which it follows that any error was harmless. We disagree. Where damages instructions are faulty and the verdict does not reveal the means by which the jury calculated damages, correction of

the error is difficult, if not impossible. In such situations, a new trial on actual damages is required. Stachura, 106 S. Ct. at 2546; Bailey v. Andrews, 811 F.2d 366, 376-77 (7th Cir.1987).

Actual damages were submitted here via a general verdict, and it is impossible for us to determine the extent to which the jury impermissibly compensated Auster for the abstract value of the deprivation of its fourth amendment rights. The evidence does not suggest that $250,000 is the absolute minimum any reasonable jury could have awarded in actual damages. The vast majority of Auster's asserted actual damages stem from loss of production from the J-8 well, and the valuation of such loss as well as the causal connection between the microdot operation and the

loss of production were hotly contested. The jury might have awarded nothing for the loss of production and a substantial figure for the violation of Auster's rights; it could have based its award primarily on proven economic damages; it could have reached any conclusion between these extremes. We decline to speculate on the most likely one, and leave the determination of damages for a properly instructed trier of fact.

V. *Passion and Prejudice in the Jury Verdict*

Appellants contend that, under this court's decision in Wells v. Dallas Independent School District, 793 F.2d 679, 683-84 (5th Cir. 1986), the jury's $5,000,000 verdict on punitive damages was so excessive as to indicate inherent passion and prejudice, and it was, therefore, an abuse of discretion for the

district court to order a $4,350,000 remittitur rather than grant a new trial. We agree.

In Wells, the court held:

> . . . when a jury verdict results from passion or prejudice, a new trial, not remittitur, is the proper remedy. On the other hand, damage awards which are merely excessive, that is, so large as to be contrary to right reason, are candidates for remittitur. However, at some point on the scale an excessive award becomes so large that it no longer can be considered merely excessive. At that point, when an award is "so exaggerated as to indicate bias, passion, prejudice, corruption, or improper motive," remittitur is inappropriate and the only proper remedy is a new trial.

793 F.2d at 683-4 (citations omitted). The court concluded that an award so large that it compelled the district court to reduce it by a factor of seven was inherently indicative of passion or prejudice, and a new trial was ordered.

Such is the case here.[5] The ratios of the punitive damages awards to remit-

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5. Auster argues that Wells is inapplicable to cases involving large-scale remittiturs of punitive damages, citing Curtis Publishing Co. v. Butts, 351 F.2d 702 (5th Cir. 1965). We disagree. Butts predicates its holding that remittitur is preferable to a new trial on the assumption that the jury has not been swayed by passion and prejudice. 351 F.2d at 718-19. Our review of the record leads us to agree with appellants that the jury ran amok on the issue of punitive damages. Butts may well counsel courts that they should ordinarily favor the remedy of remittitur when exces-

tituts in this case ranged from 5 to 1 for Carmouche to a stunning 50 to 1 for Mrs. Stream. Even after the remittitur, a punitive damage award of $650,000 in a case such as this appears excessive. These facts, along with our review of the record in this case, leave us with the inescapable conclusion that the jury was motivated by passion and prejudice in their award of punitive damages. Therefore, we hold that a new trial is required on this issue as well.[6]

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sive punitive damages are involved, but it does not affect or negate the holding of Wells: that at some point a verdict can be so excessive as to constitute a *per se* indication of prejudice and passion, and require a new trial.

6. Appellants contend that Wells entitles them to new trial on all

VI. *Conflict of Interest*

The Streams contend that they are entitled to a new trial on the grounds that their trial counsel had an improper conflict of interest in the case. Spec-

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issues, as opposed to only punitive damages. We disagree. As noted in Westbrook v. General Tire and Rubber Co., 754 F.2d 1233, 1241-42 (5th Cir. 1985), we need not require a new trial on all issues where passion and prejudice are shown, but only on those issues infected by it. Further, a jury may reach an acceptable verdict on liability yet be impermissibly swayed in its assessment of damages. Id. From our review of the record, we find it necessary to remand for a new trial, because

ifically, they assert that Carmouche's law firm, which handled the case for all defendants, prejudiced their case by, inter alia, not arguing that Carmouche was the principal actor in the case and the Streams were not involved or only indirectly involved. They further assert that this was not done because such arguments would have been deleterious to Carmouche's case. Moreover, they claim that Carmouche's firm misled them about the nature and significance of the potential conflict. Auster does not appear to question seriously that a conflict of interest was potentially present, but instead argues 1) that the matter was raised pretrial and the district court's actions taken at that time were proper and foreclose any com-

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of passion and prejudice, on the issue of punitive damages only.

plaint of conflict by the Streams, 2) even if there was an improper conflict, the Streams were not prejudiced by it, and 3) the conflict of interest argument is a ploy by the Streams to obtain a tactical advantage.

Auster has the better argument. While the potential for conflict existed, the trial court held a hearing on this issue and concluded that the Streams were aware of it and acquiesced in the arrangement for their defense. The court's conclusion is not clearly erroneous. Thus, we need not speculate further on the trial court's responsibility, if any, to ensure conflict-free representation in a civil case.

VII. *Prescription*

Carmouche contends that as he was not joined as a defendant until more than two years after the microdot incident, Auster's claim against him prescribed under the applicable one-year statute of limitations. We disagree.

In § 1983 cases, federal courts look to the most consonant statute of limitations of the forum state. Kitrell v. City of Rockwall, 526 F.2d 715, 716 (5th Cir.), cert. denied, 426 U.S. 925, 96 S. Ct. 2636, 49 L. Ed.2d 379 (1976). For § 1983 cases brought in Louisiana federal courts, the appropriate statute of limitations is one year. La. C. C. Art. 3536; Kissinger v. Foti, 544 F.2d 1257, 1258 (5th Cir. 1977). However, Louisiana law also provides that suit against one person tolls prescription for all persons solidarily obligated with

him, even if they are not named in the original, timely complaint. La. C. C. Art. 2097.

Carmouche contends that because punitive damages can be awarded in a § 1983 suit, and as there can be no joint or in solido liability for punitive damages, he could not have been held solidarily liable for punitive damages awarded under § 1983. Therefore, he reasons, since he could not have been liable in solido, the tolling provision of Louisiana law does not apply, and the prescriptive period has run. This argument is meritless. Punitive damages are not an independent claim or cause of action, but are a remedy available in various causes of action. See Alcorn County v. U.S. Interstate Supplies, Inc., 731 F.2d 1160, 1170 (5th Cir. 1984). Carmouche has cited us to no caselaw, and

we can find none, for the novel proposition that Auster had, in essence, two causes of action under § 1983: one for actual and one for punitive damages. Nor does he deny that he could validly be held liable in solido for actual damages under § 1983. Consequently, Carmouche was a person who could be solidarily obligated in tort with the original defendants under § 1983, and the statute was tolled by Art. 2097.

VIII. *Auster's Standing*

Carmouche next argues that Auster does not have standing to assert the constitutional rights of its partners and the other working interest owners in the lease, and Auster's recovery should thus be limited to damages attributable solely to its interests. This argument is also unfounded. As general partner in its drilling programs and as operator under

the operating agreement, Auster had the authority and the pretrial order stated without contest[7] that Auster could represent the limited partners' and non-operating owners' interests in litigation. Fed. R. Civ. Pro. 17.

IX. *Attorneys' Fees*

All parties challenge the award of over $300,000 in attorneys' fees. Because of our disposition of the case, we decline to rule on this issue and

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7. The pretrial order states Auster brought this action "individually and as a general partner of Auster Oil & Gas Drilling Programs No. 4 and No. 5, and as operator of the "J" Lease, for the benefit of the owners of said lease."

vacate and remand the court's judgment for further consideration in light of future developments.

Conclusion

In summary, we REVERSE as to the liability of Mrs. Stream. We AFFIRM as to the liability of Carmouche, Spook Stream, and M.G.S. We REMAND the issues of actual and punitive damages for new trial and attorneys' fees for reconsideration at the appropriate time.

AFFIRMED in Part, REVERSED in Part and REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA MONROE DIVISION

AUSTER OIL & GAS, I.

versus CIVIL ACTION NO. 83-3180

MATILDA STREAM, ET AL.

ORDER

Pursuant to the foregoing Ruling,

IT IS ORDERED that defendants' post trial motions for judgment non obstante veredicto are Denied;

IT IS FURTHER ORDERED that defendants' motions for new trial, considering plaintiff's acceptance of the remittitur, are Denied;

IT IS FURTHER ORDERED that the judgment entered against Matilda Stream is remitted by $490,000 from $500,000, to $10,000;

IT IS FURTHER ORDERED that the judgment entered against Harold Stream, III, is remitted by $1,400,000 from $1,500,000, to $100,000;

IT IS FURTHER ORDERED that the judgment entered against Edward Carmouche is remitted by $2,000,000 from $2,500,000, to $500,000.

THUS DONE AND SIGNED at Monroe, Louisiana, this 1st day of August, 1986.

/s/ DONALD E. WALTER
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

AUSTER OIL & GAS, I.

versus CIVIL ACTION NO. 83-3180

MATILDA STREAM, ET AL.

RULING

On May 12, 1986, judgment was entered in accordance with the jury verdict returned on April 10, 1986, awarding plaintiff two hundred fifty thousand and No/100 Dollars ($250,000.00) in compensatory

damages against all the defendants,[1] in solido and a total of five million and No/100 Dollars ($5,000,000.00) in punitive damages separately against respective defendants.[2] Following this judgment and within the time frame provided

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[1] Named as defendants are, Matilda Stream, Harold Stream, III, M.G.S., Lake Charles, Inc., and Edward Carmouche. Al Martin was dismissed pursuant to the verdict for his qualified immunity; the post-trial motions do not involve this defendant.

[2] Punitive damages were awarded in the following amounts; Matilda Stream, $500,000; Harold Stream, III, $1,500,000; M.G.S., Lake Charles, Inc., $500,000; and Edward Carmouche, $2,500,000.

by the Fed. R. Civ. P. 59(b), defendants filed the pending post-trial motions.[3] After hearing and oral argument, these motions are Granted in part and Denied in part.

Applying the standard for JNOV approved by the Fifth Circuit in Boeing Co. v. Shipman, 411 F.2d 365, 374-77 (5th Cir. 1969), defendants' motions are Denied. Viewing the evidence in a light and with all reasonable inferences most favorable to plaintiff, this Court cannot

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[3] All defendants filed motions for judgment non obstante veredicto ("JNOV") pursuant to Fed. R. Civ. P. 50 and for new trial, or alternatively remittitur, pursuant to Fed. R. Civ. P. 59.

conclude that "no reasonable jury could arrive at the verdict" rendered on April 10, 1986. Id. at 374.

Defendants moved for new trial, or alternatively, remittitur, on several grounds.[4] Despite their contentions and

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[4] Defendants moved for new trial asserting the following grounds: (1) the court erred in its jury instructions concerning compensatory and punitive damages, (2) the court prejudiced defendants by admitting evidence of the EMPACT project and of defendants' financial wealth, (3) defendants were prejudiced by remarks of plaintiff's counsel at trial, (4) defendants were prejudiced by the conflict of interests that was present as to their

after applying the standard for new trial reiterated in Shows v. Jamison Bedding, Inc., 671 F.2d 927, 930-31 (5th Cir. 1982), the Court denies defendants motion for new trial except as to the limited use of the amount of punitive damages. Finding the awards granted for punitive damages to exceed the amounts permitted by law, the Court entered a remittitur as to this award. Applying the "maximum recovery rule" to determine the appropriate amount of remittitur, Lowe v. General Motors Corp., 624 F.2d 1373, 1383-84 (5th Cir. 1980), the Court entered a remittitur in the following amounts: Matilda Stream, five hundred thousand dollars ($500,000) remitted four hundred ninety

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counsel, and (5) the punitive damages awarded were excessive.

thousand dollars ($490,000) to ten thousand dollars ($10,000); Harold Stream, III, one million five hundred thousand dollars ($1,500,000) remitted one million four hundred thousand dollars ($1,400,000) to one hundred thousand dollars ($100,000); MGS, Lake Charles, Inc., five hundred thousand dollars ($500,000) remitted four hundred sixty thousand dollars ($460,000) to forty thousand dollars ($40,000); and Edward Carmouche, two million five hundred thousand dollars ($2,500,000) remitted two million dollars ($2,000,000) to five hundred thousand dollars ($500,000). This remittitur was accepted by plaintiff on July 29, 1986.[5]

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[5] In entering the remittitur, the Court gave the option to plaintiff of accepting the remitted amounts

The Court denies defendants' motion as to the other contentions for new trial.

Defendants contend the Court's jury instructions on damages, especially as to recovery for constitutional violations and for punitive damages, merits a new trial; the Court disagrees. The Fifth Circuit recently considered the exact instruction given by this Court as to

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in whole or in part or of a new trial on the limited issue of the amount of punitive damages. By accepting the remittitur, plaintiff loses the right to appeal this decrease. Lowe, 624 F.2d at 1383-84; Donovan v. Penn Shipping Co., Inc., 97 S.Ct. 835 (1977).

punitive damages.[6] Young v. City of New Orleans, 751 F.2d 794, 799-800 (5th Cir. 1985). Despite the noted criticism of using "malice" and "willfulness" in explaining the standard for punitive damages, Smith v. Wade, 103 S. Ct. 1625, 1631-32 n.8 (1983), these words must be interpreted in context with the rest of the enunciated standard. The inclusion

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[6] As to punitive damages, the Court instructed, "If you find for the Plaintiff, and if you further find that any Defendant did act with malice, willfulness or callous and reckless indifference to the rights of others, the law would allow you, in your discretion, to assess punitive damages against such Defendant as punishment and as a deterrent to others."

of "callous and reckless indifference" assures that the jury applied the correct standard in awarding punitive damages.[7]

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[7] An application of Fed. R. Civ. P. 59 necessarily includes a consideration of Fed. R. Civ. P. 61, which provides, "No error in either the admission or the exclusion of evidence and no error or defect in any ruling or order or in anything done or omitted by the court or by any of the parties is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard

Defendants also contend that the Court erred by instructing the jury that, "The Plaintiff may recover, if proven, damages for the violation of Plaintiff's constitutional rights." The Court is aware of the Supreme Court's holding in Memphis Community School District v. Stachura, slip op. 85-410 (June 25,

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any error or defect in the proceeding which does not affect the substantial rights of the parties." Reading the Court's punitive damages instruction in its entirety, the jury was correctly instructed concerning punitive damages; if any error occurred, it surely falls within the ambit of Rule 61.

1986),[8] but concludes that any error by

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[8] In Stachura, supra, at 4 n.2, the district court instructed the jury that, "If you find that the Plaintiff has been deprived of a Constitutional right, you may award damages to compensate him for the deprivation. Damages for this type of injury or injury to one's property. [sic] There are not medical bills or other expenses by which you can judge how much compensation is appropriate. In one sense, no monetary value we place upon Constitutional rights can measure their importance in our society or compensate a citizen adequately for their deprivation. However, just because these rights are not capable of precise evaluation does

not mean that an appropriate monetary amount should not be awarded. The precise value you place upon any Constitutional right which you find was denied to Plaintiff is within your decision. You may wish to consider the importance of the right in our system of government, the role which this right has played in the history of our republic, [and] the significance of the right in the context of the activities which the Plaintiff was engaged in at the time of the violation of the right." Ordering a new trial, the Supreme Court held that "damages based on the 'value' or 'importance' of constitutional rights are not authorized by § 1983, because they are not truely

giving the above instruction was harmless. See Supra n. 7. The Court's instructions on compensatory damages must be read in pari materia.[9] Moreover, the

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compensatory." Id. at 9. Here, the instructions are distinguishable. See Infra n.10.

[9] In prefacing instructions on damages, the Court instructed the jury that, "If you should find for the Plaintiff and against the Defendants, you must then decide the issue of damages. In considering the issue of Plaintiff's damages, you are instructed that you should assess the amount you find to be justified by a preponderance of the evidence as full, just and reasonable compensation for all of the Plaintiff's damages. Damages must

jury's award of compensatory damages is supported by evidence, being viewed under the standard restated in Shows, 671 F.2d 927, which proves actual damages in the amount of two hundred fifty thousand dollars ($250,000). This argument for new trial is Denied.

Grounds 2, 3 and 5, supra n.4, asserted by defendants as reasons entitling them to a new trial are without merit. Concerning remarks made by plaintiff's

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not be based on speculation because it is only actual damages--what the law calls compensatory damages--that are recoverable." This instruction acted as a guiding principle for the following instructions, thus clearly distinguishing the matter sub judice from Stachura, supra.

counsel at trial, no objections were made at trial; therefore, foreclosing the assertion of this ground post-trial. Wright & Miller, § 2809 at 62-64. Prejudice or passion allegedly resulting from introducing the Empact materials and defendants' financial statements was minimized by instruction from the Court.[10]

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[10] The Court instructed the jury that, "in deciding the facts of this case you must not be swayed by bias or prejudice or favor as to any party. Our system of law does not permit jurors to be governed by prejudice or sympathy or public opinion. Both the parties and the public expect that you will carefully and impartially consider all of the evidence in the case, follow the law as stated by the Court, and

This instruction was also applicable to the jury's consideration of passion or prejudice in any of its deliberations. If any error occurred here, it was harmless within the meaning of Rule 61 and does not merit a new trial.

Finally, addressing defendants' conflict of interest argument for new trial: the conflict was in this Court's opinion more apparent than real. All of the evidence of the Streams' relying on advice of counsel[11] was presented to the

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reach a just verdict regardless of the consequences."

[11] Obviously a factor to consider in assessing punitive damages, Crowe v. Lucas, 595 F.2d 985, 992 (5th Cir. 1979), the Streams also argue that they are entitled to a quali-

fied immunity from § 1983 liability because they relied on advice of counsel. The Court disagrees. The test for conferring such an immunity or good faith defense is two-fold: (1) whether at common law the courts recognized and continue to recognize an immunity for the actions of certain officials, i.e., the common law immunity for police officers against liability for false arrest. Owen v. City of Independence, Mo., 100 S. Ct. 1398, 1407-09 (1980); and (2) an important public interest that demands citizens be shielded from § 1983 liability, i.e., the important public interest in permitting ordinary citizens to rely on presumptively valid state laws. Folsom

Jury, in fact, was argued to the jury. The Streams' trial counsel argued that what was done was legally permissible, and was reasonable. What was missing was the Streams' trial counsel hanging Mr. Carmouche "out to dry" to "paint him a wicked man."[12] Would that really have

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Investment Co., Inc. v. Moore, 681 F.2d 1032, 1037-38 (5th Cir. 1982). Relying on advice of counsel was not an immunity at common law and does not exude the "important public interest" noted in Folsom Investment, supra. There is no qualified immunity for reliance of advice of counsel. Crowe, 595 F.2d at 992.

12 The Court mentions in passing that what appears to be the failure to argue the exclusive liability of

affected anything the jury did? The jury found, obviously, that while the Streams did not rely on counsel so as to act as a bar to awarding punitive damages, the jury, at least awarded lesser amounts against Mr. Stream, MGS, Lake Charles, Inc., and Mrs. Stream.

The fact that no third party actions were filed is not evidence of conflict. Third party actions are often not filed so that defendants can present a united front. The Stream interests are not pre-

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Edward Carmouche could as well be charged to unsuccessful trial tactics as to the apparent conflict. The jury was in the main correct in its findings; the conflict which may well have been more apparent than real does not require a new trial.

cluded from filing an action even now against parties they feel have wronged them or might owe them indemnity.

The court is making no comment on whether a suit should be filed or whether it could be successfully maintained, but it does seem a fairer utilization of everyone's time to resolve the "conflict" in that fashion rather than to make the successful plaintiffs try this case again. Nearly six months before this trial, the Court told the Streams' attorney to contact his clients and determine whether or not a conflict existed and whether they wanted to waive a conflict if one existed. The conflict was apparent. The question was whether the Camp firm should withdraw or not. During the course of the November conference, this Court instructed counsel by minute

entry that, "notice of withdrawal if required by Matilda Gray Stream and M.G.S.'s attorney and substitution of new counsel shall be filed no later than November 25, 1985." If counsel failed to adequately advise his clients, either intentionally or accidentally, the error is his, not Auster's.

The Court is directed to Dunton v. County of Suffolk, 729 F.2d 903 (2d Cir. 1984), for the proposition that the Camp firm should have been disqualified and, absent this, a new trial should be granted because of the apparent conflict of interest. However, of more relevance is language in the Fifth Circuit opinion of McCuin v. Texas Power and Light Co., 714 F.2d 1255 (5th Cir. 1983). Judge Rubin pointed out that a motion by the defendant to substitute counsel on the eve of trial need not be granted "even if the

reason is an alleged conflict of interest and the defendant's right to counsel with undivided loyalty." Id. at 1263. Although recognizing that the right to counsel in civil cases in fundamental, id. at 1262, the Court went on to hold that this right cannot be used as a dilatory or trial tactic. Id. at 1263. In the case at bar, the Streams asserted the right to conflict free counsel even later than the defendant in McCuin, supra; this argument cannot be the basis for granting a new trial.

This case is not one of some one time, one case affair between a lawyer and client who did not know each other. The decision to inextricably entwine the Carmouche firm with the Stream interest was made long before this case arose, indeed before some of its participants were born. The conflict-free assistance

of counsel, cherished and fundamental through it may be, may not be put to serve as a means of trifling with the Court.[13] United States v. Fowler, 605 F.2d 181, 183 (5th Cir. 1979).

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[13] The decision on whether to disqualify counsel rests within the discretion of the trial court. Laker Air Ways Ltd. v. Pan American World Airways, 103 F.R.D. 22, 27 (D.D.C. 1984). Further clarifying this discretionary standard, the Fifth Circuit suggests the trial court must make its decision in the interest of justice to all concerned, and it must balance the need to ensure proper conduct on the part of the attorneys against the interest in retaining counsel of one's choice. Cossette v. Country Style Donuts, Inc., 647 F.2d

Dunton, supra, is clearly distinguishable as a case in which the attorney's prime loyalties lay with the city, to the extent that counsel literally threw the policeman's interests to the wolves. The relationship between the policeman and the city attorney was certainly not as here, the sophisticated choice of educated people with the long history of personal friendship and business relationships.

526, 530 (5th Cir. 1981). Allegations of conflict or potential conflict are not sufficient to disqualify an attorney; there must be a reasonable possibility some specifically identifiable impropriety occurred in order to warrant disqualification. Id.

There is also the question of certain members of the defendants' firm being witnesses. The Court finds that this was fully disclosed between the Stream interests and members of the Camp, Carmouche firm. Auster does not complain. The Court having taken the step of ordering the separation of witness and counsel on pleadings and participation in the trial, does not.[14] As to complaints by defendants, these come far too late. The fact

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[14] This Court agrees with the Second and Tenth Circuit that the advocate/witness prohibition of DR 5-102(B) is designed principally for two situations: "(1) when a lawyer acts as both attorney and witness, and (2) when trial counsel's law partner is a witness but

but not a party. See Bottaro v. Hatton Associates, 680 F.2d 895 (2d Cir. 1982); In Re American Cable Publications, Inc., 768 F.2d 1194 (10th Cir. 1985). "The rules prevent situations in which others might think the lawyer, as witness, is distorting the truth for his client or is enhancing his own credibility as advocate by virtue of having taken an oath as witness, as well as the uneasy situation that arises when an opposing counsel must impeach on cross-examination another lawyer-adversary." American Cable, 768 F.2d at 1196. However, "[t]hese purposes are not implicated when a lawyer is a litigant [and]. . .a witness, but not an advocate, even

that Carmouche and Mize could necessarily be witnesses has been known since the first suit that was the fruit of these activities was filed. No previous court, including the Fifth Circuit, has seen fit to comment on this apparent ethical violation. This Court simply cannot see how this violation demands a new trial.

> though a member of his [] firm is trial counsel." Bottaro, 680 F.2d at 897. "The role of the lawyer-litigant-witness is confined to testifying and his [] interest in the outcome of the litigation is clear to the trier of fact." *Id.* This rule is not applicable to the present situation and, thus, does not merit a new trial.

Attorney's Fees

The prevailing litigant in a civil rights action ordinarily is entitled to recover attorney's fees. Taylor v. Sterrett, 640 F.2d 663, 668 (5th Cir. 1981). Pursuant to 42 U.S.C. § 1988, which provided in pertinent part,

> "[i]n any action or proceeding to enforce a provision of section [] . . . 1983 [of Title 42], . . . the Court, in its discretion, may allow the prevailing party . . . a reasonable attorney's fee as part of the costs,"

this award is left to the sound discretion of the trial court. Id. Here, Auster Oil & Gas, Inc., plaintiff, is clearly a prevailing party within the meaning of this part.[15] The Court must now go about the task of determining the amount of the award.[16]

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[15] § 1988, by its terms, permits an award of attorney's fees only to a

The purpose of § 1988 is to ensure "effective access to the judicial process" for persons with civil rights grievances. Hensley v. Eckerhart, 103 S. Ct. 1933, 1937 (1983). As noted by the

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"prevailing party." Taylor, 640 F.2d at 699. In determining prevailing party status, the focus is "not on the form of the final judgment but on the substance of the relief." Tasby v. Wright, 550 F.Supp. 262, 271 (N.D. Tx. 1982). In the present matter, this determination is not difficult; the jury awarded Auster substantial relief under its § 1983 claim.

16 The Court must articulate the basis for its award of attorney's fees, thus insuring meaningful appellate review of its discretion.

Supreme Court in Riverside v. Rivera, slip op. no. 85-224 (June 27, 1986), the congressional intent for enacting this provision was to allow plaintiffs to enforce civil rights laws, especially under the adverse circumstances of an unpopular cause or where the amount of damages at stake would not otherwise make it feasible for them to do so.[17] Id. at 15.

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[17] Quoting the Senate Reports, the Supreme Court noted, "[F]ee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate the important Congressional policies which these laws contain. . . . If private citizens are to be able to assert their civil rights, and if those who violate the National's fundamental laws are not

Defendants contend the purpose of the Act is not being effected here; thus, plaintiff should not be allowed to recover attorney's fees. Although the Court feels the public interest advanced by this litigation will be a factor to consider in excluding certain billing entries,[18] plaintiff is still a successful litigant under § 1988 and should be allowed reasonable attorney's fees.

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to proceed with impunity, then citizens must have the opportunity to recover what it costs them to vindicate these rights in court." See S. Rep. No. 94-1011, p.2 (1976)(hereafter Senate Report). Rivers, slip op. at 15.

[18] In calculating the reasonable amount of hours spent in this mat-

Recognizing that prevailing parties in civil rights actions should ordinarily recover attorney's fees under § 1988 unless special circumstances would render such an award unjust, defendants contend the case at bar is one entailing such special circumstances. Arguing the present action is essentially a misplaced

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ter and the reasonableness of certain items claimed as cost, the negligible public interest advanced in this matter, considering the extreme facts of this case, adequately reviewed by the Fifth Circuit in Auster Oil and Gas, Inc. v. Stream, 764 F.2d 381 (5th Cir. 1985), and in comparison to a police brutality case, will operate to reduce and exclude some items.

tort action, defendants contend attorney's fees are not recoverable.

The Fifth Circuit has recognized such special circumstances as would render an award under § 1988 unjust. Taylor, 640 F.2d at 668. Nevertheless, § 1988 requires astrong showing of special circumstances to justify denying an award of attorney's fees and costs to the prevailing party in a § 1983 claim. Riddell v. National Democratic Party, 624 F.2d 539, 543 (5th Cir. 1980). Arising only in unusual situations, special circumstances sufficient to deny an award of attorney's fees include a plaintiff's § 1983 claim which was essentially a tort claim for private monetary damages and an action where plaintiff's complaint was not instrumental in remedying a civil rights

violation.[19] Id. at 544-45. Despite these exceptions, the jury clearly held that plaintiff's claim fell under the constitution and § 1983; it was not a tort action. The Court holds the above special circumstances are not applicable to the case at bar.

Satisfying § 1988's threshold inquiry as to prevailing party, the Court sets about calculating a reasonable attorney's

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[19] The district court in Clay v. Harris, 583 F. Supp. 1314 (N.D. Ind. 1984), recognized another special circumstance for denying relief under § 1988 where a plaintiff prevailed but an award of attorney's fees would encourage numerous trivial lawsuits.

fee under § 1988. The Supreme Court in Hensley, 103 S. Ct. 1933, announced certain guidelines for calculating a reasonable attorney's fee. Hensley stated that "[t]he most useful starting point for determining the amount of a reasonable fee is the number of hours expended on the litigation multiplied by a reasonably hourly rate." Id. at 1939. This figure, commonly referred to as the "lodestar," is the starting point in calculating a reasonable fee as contemplated by § 1988. Rivera, at 5. In reaching this "lodestar," the Supreme Court cautioned that "[t]he district court ... should exclude from this initial fee calculation hours that were not reasonably expended" on the litigation. Hensley, 103 S. Ct. at 1939-40.

Auster seeks to recover attorney's fees for hours billed in relation to two

previous state court proceedings, namely a state court injunction and a state court lease cancellation suit.[20] To recover attorney's fees under this part, the two state court suits must be "action[s] or proceeding[s]" within the meaning of § 1988; plaintiff's argument necessarily implies this conclusion.

Several courts have addressed this issue, and, although a difference of opinion exists between the circuits, the Fifth Circuit has established a well settled rule. Redd v. Lambert, 674 F.2d 1032 (5th Cir. 1982); see Ciechon v. Cityof Chicago, 686 F.2d 511 (7th Cir. 1982)(representing the split of opinion

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[20] On the date of this Ruling, these proceedings were still pending in state court.

where attorney's fees under § 1988 were allowed in a Title VII case involving optional administrative proceedings). In Redd, 674 F.2d at 1037, the Fifth Circuit held that, "attorney's fees can be awarded for state proceedings only when these proceedings form an 'integral part of the federal remedy.'"[21]

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[21] An exhaustion requirement of state or administrative remedies is the key example of what the Fifth Circuit meant by the phrase "integral part of the federal remedy." Id. at 1036-37. In Bartholomew v. Watson, 665 F.2d 910 (9th Cir. 1982), cited in Redd, supra, the district court's award of attorney's fees for work done in both state and federal court was affirmed. In this § 1983 action ques-

In the case at bar, the state proceedings are independent of the § 1983 claim. Exhaustion of administrative or state remedies are not a prerequisite to an action under § 1983. Patsy v. Florida Board of Regents, 457 U.S. 496, 501 (1981). Moreover, the injunction and lease cancellation suits are independent

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tioning the constitutionality of state prison proceedings, the court of appeals upheld the attorney's fees award because the "initial determination of potentially conclusive state law issues was an integral part of the § 1983 claims and as such was a necessary preliminary to the enforcement of a provision of 42 U.S.C. § 1983. Bartholomew, 665 F.2d at 913.

state court causes of action, whose outcome has little bearing on the § 1983 action pending before this court.[22] Therefore, following Redd, supra, attorney's fees from prior state proceedings are not collectable in the case at bar.[23]

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[22] An attempt to recover attorney's fees for the pending state court matters could be viewed as an effort to circumvent state law which does not provide for attorney's fees in these situations. Such an effort will not be allowed by this Court.

[23] Further bolstering the Fifth Circuit's position in Redd, supra, is the legislative history of § 1988 which shows that Congress did not intend attorney's fees awards for optional administrative or state work. Webb v. County Board of Edu-

cation of Dyer County, Tennessee, et al., 715 F.2d 254, 258-59 (6th Cir. 1983). Although this issue is not directly addressed, both Senate and House Reports state the purpose of § 1988 was "to allow courts to provide the familiar remedy of reasonable counsel fees to prevailing parties" in suits to enforce their civil rights. Id. at 258. Key to the above inference is that before attorney's fees will be collectable, the action taken must be directly toward enforcing ones civil rights under the civil rights act passed since 1966. Id. Here, the state proceedings do not tend toward plaintiff's suit under § 1983; therefore, attorney's fees for those actions are properly DENIED.

Hours billed to the state court suits are excluded from the Court's determination of reasonable hours in the pending matter.

Other hours to be excluded from the "lodestar" calculation of reasonable hours is the billing for three attorneys at trial and for the time spent by Mr. Shaddock in reviewing and writing a memorandum concerning William Faulkner. Despite the uniqueness and complexity of the present litigation, the time of three attorneys at trial is unreasonable. All questioning was conducted by one counsel while the others apparently organized exhibits and their presentation. Such planning in the present matter was obviously done prior to trial and did not merit the time of three attorneys during

trial;[24] therefore, only the time of two attorneys may be billed for actual trial time. The time spent on Faulkner was unreasonable and added nothing to the prosecution of this case.

Undeniably, the amount of the fee must be determined on the facts of each case. Hensley, 103 S. Ct. at 1937. In making this assessment, the Fifth Circuit in Johnson v. Georgia Highway Express, Inc., 488 F.2d 714 (5th Cir. 1974), identifies twelve (12) factors to be con-

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[24] Although the presence of three attorneys made the trial run much smoother, billing the hours of three attorneys is excessive and redundant. Hensley, 103 S. Ct. at 1939-40.

sidered in calculating a reasonable attorney's fee.[25]

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[25] While the statute itself does not explain what constitutes a reasonable fee, both the House and Senate Reports accompanying § 1988 expressly endorse the analysis set forth in Johnson, supra. Rivera at 5. *See* Senate Report, p. 6; H.R. Rep. No. 94-1558, p. 8 (1976) (hereafter House Report). "These factors are: (1) the time and labor required; (2) the novelty and difficulty of the questions; (3) the skill requisite to perform the legal service properly; (4) the preclusion of employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether

Absent the above exclusions, the hours billed to the civil rights suit by the Stockwell firm through the end of trial are reasonable. Additionally, the hours billed post trial to present are reasonable and also recoverable. The extensive billing invoices submitted by plaintiff's counsel adequately identify

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the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases. 488 F.2d, at 717-719."

hours spent in performing certain tasks. These invoices include numerous entries for research, briefing and conferences. The deluge of paper characteristic of this case justifies the numerous entries for conferences reviewing various memorandums. Also, the procedural history of this matter, including the numerous motions, accounts for the hours spent in researching and writing.[26] These entries

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[26] Beginning with the granting of a motion to dismiss by Chief Judge Stagg, this case was appealed to the Fifth Circuit and reversed and remanded to the district court. This Court denied a motion for summary judgment as to Matilda Stream before plaintiff filed its amended complaint adding Harold Stream, III, and Edward Carmouche as defendants. Thereafter, all defendants

present reasonable hours that are included in calculating the "lodestar."

The case at bar involved a novel use of the Civil Rights Act concerning an extremely unusual fact situation. To satisfy the threshold requirement of "under color of state law," plaintiff had to win an appeal; and then, not the least of its burden, prove by a preponderance of the evidence that private individuals acted in concert with state officials. Other issues such as punitive damages and

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filed dispositive motions, including Mrs. Stream's second motion for summary judgment. Also, various pretrial motions in limine were filed, and plaintiff was largely responsible for the filing of a very extensive pretrial order.

the attorney's fee issue itself, were quite complex and involved extensive research and preparation.[27]

Post trial hours involved research and briefing of equally complex issues. The new issue of conflict of interests was raised by defendants in their post trial motions, which called for several briefs and a hearing. Defendants' counsel caused the added complexity by not advising their clients of the apparent conflict of interest. Plaintiff had to

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[27] Defendants contend plaintiff should not recover for the time spent on its unsuccessful §§ 1985 and 1986 claims. The Court disagrees. Much of the time spent in prosecuting these claims necessarily aided counsel in preparing their successful claims.

respond to defendants' contentions; hence, Auster will recover for these billed hours.

The other factor of the so-called "lodestar" involves the determination of a reasonable hourly rate. Plaintiff's counsel billed their client at one hundred dollars per hour ($100/hr.), using this amount as a reasonable rate under § 1988. The Court agrees with plaintiff. Although this case was not the usually "undesirable" litigation common to civil rights litigation, the matter at bar does have many of the other Johnson factors which support the claimed rate. The time and labor required, the novelty and difficulty of the issues, and the skill required to perform the legal services properly have already been discussed. Counsel were always extremely well prepared, even in the face of some rather

short deadlines. Noting the verdict in the matter, counsel for plaintiff achieved the desired results. Finally, taking notice of the customary fees in the community, the Court holds that one hundred dollars per hour ($100/hr.) is a reasonable rate.

After determining the "lodestar," which is presumed to be the reasonable fee contemplated by § 1988, Rivera, at 5, the Hensley court suggested other considerations that might lead the district court to adjust the lodestar figure upward or downward.[28] Id. at 1939-40.

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[28] An important factor in this final adjustment is the results obtained at trial. Hensley, 103 S. Ct. at 1939-40. However, this is only one factor which must be considered in light of the other Johnson criteria.

Plaintiff claims it is entitled to recover as costs photocopying expenses, travel expenses, mailing expenses, expert witness fees and exhibit preparation expenses. Defendants oppose this argument, suggesting only those costs specifically enumerated in 28 U.S.C. § 1920 or other statutes are recoverable. The Court agrees with defendants.

Following the recent Fifth Circuit opinion of IWA v. Champion International Corp., slip op. no. 83-4616 (June 2, 1986, § 1988 provides only for the recovery of attorney's fees by the prevailing party but does not include other expenses and cost of the litigation. Id. at 6064-65. Even though the specific holding of IWA, supra, only concerned expert witness fees, the Court suggests a much more sweeping effect. Id. Noting the broad expanse of IWA, supra, this Court holds

only those items recoverable as costs under § 1920[29] or other specific statutes[30] are reasonable. Other costs are not recoverable.[31]

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[29] § 1920 provides, "A judge or clerk of any court of the United States may tax as costs the following: (1) Fees of the clerk and marshal; (2) Fees of the court reporter for all or any part of the stenographic transcript necessarily obtained for use in the case; (3) Fees and disbursements for printing and witnesses; (4) Fees for exemplification and copies of papers necessarily obtained for use in the case; (5) Docket fees under section 1923 of this title; (6) Compensation of court appointed experts, compensation of interpreters, and salaries, fees, expenses, and costs

of special interpretation services under section 1828 of this title. A bill of costs shall be filed in the case and, upon allowance, included in the judgment or decree."

30 The only other suggested statute in the case at bar is 28 U.S.C. § 1821, which provides in relevant part, "(b) A witness shall be paid an attendance fee of $30 per day for each day's attendance. A witness shall also be paid the attendance fee for the time necessarily occupied in going to and returning from the place of attendance at the beginning and end of such attendance or at any time during such attendance. This section draws no distinction between ordinary and expert witnesses, and it--or, more

In light of the strong dissent by Judge Rubin in IWA, slip op. at 6065, the Court also concludes the recovery of costs other than the ordinary witness

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precisely its statutory predecessor--has been held to apply to both categories of witnesses alike. See Henkel Chicago, St. P., M. and O. Rwy., 284 U.S. 444 (1932)." IWA, slip op. at 6059 n.4.

[31] Necessarily included within this exclusion are expenses for paralegals, secretaries and other support personnel.

fees and docket fees would be unreasonable under § 1988 and Johnson, supra. As to photocopying expenses, counsel have already been paid for preparing the memorandum or for researching the case that is being duplicated. Similarly, travel costs, mailing costs and long-distance expenses amount to the recovery of the type of expenses usually associated with the practice of law and covered overhead expenses.

As to expert witness and exhibits, recovery as costs for these items is also unreasonable. The expert witnesses called by plaintiff offered little, in the Court's opinion, to the final verdict. The testimony of the two police experts was extremely limited, providing no new or crucial evidence. Moreover, the aim of these two witnesses was directed toward Mr. Martin, the defendant

released pursuant to his qualified immunity. As to Mr. Harrell, although helpful, his testimony does not merit more than the ordinary witness fee--thirty dollars ($30). Finally, the model of the well did not prove very helpful. Whether excluded under IWA, supra, or by a reasonableness determination, items for costs are limited to those specifically enumerated in §§ 1920 and 1821.

THUS DONE AND SIGNED at Monroe, Louisiana, this 1st day of August, 1986.

/s/ DONALD E. WALTER

United States District Judge

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAKE CHARLES DIVISION

Civil Action No. 83-3180

Auster Oil & Gas, Inc.

versus

Matilda Gray Stream, Et Al.

JUDGMENT ON GENERAL VERDICT ACCOMPANIED BY SPECIAL INTERROGATORIES

This action came on for trial before the Court and a jury, beginning on March 11, 1986, and concluding on April 10, 1986, Honorable Donald E. Walter, District Judge, presiding, and the Court having instructed the jury to find a

general verdict and also to make answer to certain special interrogatories, and the jury having duly rendered a verdict and having made answers to said interrogatories, which have been filed in the record herein;

IT IS ORDERED, ADJUDGED AND DECREED that the Plaintiff, Auster Oil & Gas, Inc., on its own behalf individually and as general partner of Auster Oil & Gas Drilling Programs No. 4 and No. 5, and as Operator of the "J," "F," and "Intreco" Leases, for the benefit of the owners of said leases, recover compensatory damages from the Defendants, Edward M. Carmouche, Harold H. Streams [sic], III, Matilda Gray Stream and M.G.S. Lake Charles, Inc., in solido, [in] the sum of Two Hundred Fifty Thousand ($250,000.00) Dollars, with interest thereon at the

rates provided in 28 U.S.C. 1961, from the date this action was filed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, Auster Oil & Gas, Inc., individually and as general partner of Auster Oil & Gas Drilling Programs No. 4 and No. 5, and as operator of the aforesaid leases for the benefit of the owners of said leases, recover the following sums of punitive damages: Five Hundred Thousand ($500,000.00) Dollars from Defendant, M.G.S. Lake Charles, Inc.; Five Hundred Thousand ($500,000.00) Dollars from Defendant, Matilda Gray Stream; One Million Five Hundred Thousand ($1,500,000.00) Dollars from Defendant, Harold H. Stream, III; and Two Million Five Hundred Thousand ($2,500,000.00) Dollars from Defendant, Edward M. Carmouche, together with legal interest on each of these sums at the rates

stipulated in 28 U.S.C. 1961, from the date this judgment is signed.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that all of Plaintiff's claims against Defendant Al Martin are hereby dismissed, with prejudice.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Plaintiff, Auster Oil & Gas, Inc., individually and as general partner of Auster Oil & Gas Drilling Programs No. 4 and No. 5, and as operator of the aforesaid leases for the benefit of the owners of said leases, recover from Defendants, M.G.S. Lake Charles, Inc., Matilda Gray Stream, Harold H. Stream, III and Edward M. Carmouche, reasonable costs and attorney fees to be later fixed by the Court.

JUDGMENT READ, RENDERED AND SIGNED in Monroe, Louisiana, this 8th day of May, 1986.

/s/ DONALD E. WALTER
United States District Judge

Judgment Entered 5/12/86

APPENDIX F

AUSTER OIL & GAS, INC.,
Plaintiff-Appellant,

vs.

Matilda Gray STREAM, et al.,
Defendants-Appellees.

No. 84-4486.
764 F.2d 381 (5th Cir. 1985)

United States Court of Appeals,
Fifth Circuit.

July 1, 1985.

Appeal from the United States District Court for the Western District of Louisiana.

Before WISDOM, WILLIAMS and HILL, Circuit Judges.

JERRE S. WILLIAMS, Circuit Judge:

The district court dismissed the complaint of appellant Auster Oil & Gas Company as to appellees Matilda Gray Stream and M.G.S. of Lake Charles, Inc., on the ground that Auster had failed to

state a claim against them under 42 U.S.C. § 1983. The court also denied Auster's motion to amend its pleadings to allege facts it discovered after the dismissal. We hold that Auster's original complaint stated a section 1983 claim and that the district court should have allowed the amendment. We accordingly vacate the judgment and remand the case for further proceedings.

I. THE SOUND AND THE FURY

The events underlying Auster's claims could have arisen in Yoknapatawpha County, Mississippi,[1] but most of them

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1. William Faulkner imagined Yoknapatawpha County and authored several novels about it and its denizens. See generally, e.g., C. Brooks, Toward Yoknapatawpha and Beyond (1978); I. Howe, William Faulkner (1975).

happened in Calcasieu Parish, Louisiana, where Stream owned the surface and mineral rights in oil-producing property.

A. *Lease in August*

Stream's dealings with Auster appear to have commenced in the summer of 1971, when she granted to Auster and other lessees an oil, gas, and mineral lease covering her land in the Ged Field, which lies within Calcasieu Parish. The parties filed the lease on August 10, 1971, and the Parish officially recorded it the following day. Stream retained a significant royalty interest. The lease also reserved to her the right of "access to the premises at all times for the purpose of observing all operations hereunder . . . ." In 1979, the lessees contractually designated Auster as the exclusive operator of the lease, and the company began to operate and control for

the benefit of all lessees a variety of oil production, transportation, and storage facilities, including wells, pipelines, and other routing equipment. A 1982 amendment to the lease increased Stream's royalty interest and gave her an option to purchase a ten percent working interest in any new wells. Stream later bought such an interest in the M-1 well, but she did not sign the 1979 operating agreement.

B. *The Reivers*

Although her relationship with Auster apparently proceeded smoothly for several years, Stream began to suspect the company of stealing oil from the lease. In late 1982, a security agent for an oil company that owned an interest in the Ged Field heard rumors of thievery, and he initiated an investigation. The agent contacted Louisiana State Police

officials, who opened a criminal investigation and assigned Trooper First Class Al Martin to determine whether grounds existed for filing criminal charges. Martin's efforts brought him into contact with Edward M. Carmouche, an attorney representing M.G.S. and Stream. Carmouche attended several meetings that law enforcement officials had called. The State Police closed their investigation in July 1983 without bringing any charges.

Carmouche's role, however, had only begun. In April 1983, Stream and M.G.S. had authorized the lawyer to investigate Auster's operations. On April 12, he wrote to Auster demanding cancellation of its leases. The letter alleged that Auster maintained "an unauthorized network of pumps, tanks and above ground and below ground pipes" and that Auster's

"lack of attention to operations over an extended period of time has been of such a gross character as to have permitted the diversion of enormous quantities of oil beyond gauging equipment." Carmouche also threatened legal action. Auster responded by denying the allegations and demanding that Carmouche immediately withdraw his letter or risk litigation.

C. *Intruders in the Dust*

Carmouche did not stop at writing letters. He hired a private investigator, among others, to assist him in determining whether Auster had a secret pipeline network by which the company siphoned off oil. He also enlisted the aid of the State Police, and Martin rejoined the investigation. After several discussions, Carmouche, his private agents, and the State Police

devised a plan for tracing the flow of oil from wells on the lease property.

The nature of the operation reflected the need to monitor the flow through segments that escaped visual observation because of their location underground. Carmouche and the others thus planned to introduce plastic capsules containing microchips into pipelines near the wells from which they carried oil and to place screens across the pipelines where they left the lease property. The movement of the oil would either lodge the microchips against the screens or carry them through other pipelines that circumvented the equipment that measured the amount of oil the lease produced. If the microchips failed to appear at the screens and the operation otherwise went well, Carmouche would have substantially confirmed Stream's suspicions of theft.

Carmouche's private agents travelled to Oklahoma in the late summer of 1983 to buy the microchips, and M.G.S supplied the funds for the purchase.

Participants in the investigation executed their plan on Sunday, September 25, 1983. The record does not clearly indicate who helped, but it does disclose that Martin observed the operation and that other State Police officers kept a lookout during the procedure. The participants disassembled well choke assemblies, shut off various valves, and broke open pipelines. Carmouche and the others apparently believed that the 1971 lease provision granting Stream and her representatives access at all times to the lease authorized their actions. No one had obtained a search warrant.

The tracing apparently failed. Microchips stuck in the packing in the

M-1 wellhead, blocking the flow and causing the well to spew several barrels of oil onto the ground. Some of the J-8 well microchips apparently reached the screens, but Carmouche and the others failed to retrieve them. They, too, blocked the pipeline, delaying Auster's transportation and sale of the oil.

D. *Auster's Gambit*

Auster soon discovered the tampering, and it demanded that Stream explain her agents' behavior and pay compensation for damage to its equipment and operations. Stream answered that she and her agents had acted lawfully. Auster then sought preliminary and permanent injunctions in Louisiana state court to bar Stream from further intrusions upon Auster's property. The state court denied the request for a preliminary injunction, but discovery and other proceedings

continued. At the instance of Stream, the state court also issued a protective order limiting the scope of Auster's discovery.

Auster filed this suit on December 20, 1983. The original complaint alleged that Stream, M.G.S., and Trooper Martin had conspired to deprive Auster of property without due process of law and to conduct an unlawful search and seizure of the company's property in violation of the Fourth and Fourteenth Amendments and that they had executed that conspiracy. Auster also asserted that appellees Stream and M.G.S. had planned and performed the microchip operation in an effort to break Auster's leases[2]. Auster demanded compensatory and punitive damages.

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2. The original complaint specifically alleged that appellees wanted

E. *Go Down, Auster or Requiem for a Plaintiff*

Less than a month after Auster filed its complaint, Stream and M.G.S. moved for dismissal of the claims against them.

> to abrogate the leases to assist them "in the development and implementation of a hazardous waste storage facility in a salt dome located in the Ged Field ("Ged Dome") and located on property owned and controlled by (appellees) in the event the Auster leases were cancelled." The record discloses that Stream and others granted to Pakhoed USA Management Co., which proposed to develop the waste storage facility, an option to lease property in the Ged Field for the three years ending December 12, 1985.

On April 17, 1984, the district court granted the motion pursuant to Fed. R. Civ. P. 12(b)(6). The court held that Auster had not alleged facts sufficient to establish the "state action" that section 1983 requires. It further found that microchip operation did not violate Auster's constitutional rights because state remedies would adequately compensate any property damage and because the 1971 lease authorized Stream and her representatives to investigate the company's operations. Auster sought interlocutory review of the dismissal, but this Court dismissed the appeal because Martin remained a defendant and the district court had not certified the case for interlocutory appeal.

On June 22, 1984, Auster petitioned the district court to reconsider its order of dismissal, to allow amendment of

the complaint, or to enter final judgment as to Stream and M.G.S. under Fed. R. Civ. P. 54(b) so as to permit an interlocutory appeal. Auster claimed that it had recently discovered evidence that would cure any defects in its original complaint. The district court denied the motions to reconsider and to amend, but it did enter final judgment against Auster on its claims against Stream and M.G.S. Auster appeals the judgment and the order denying its motion to amend.

II. STANDARD OF REVIEW; SANCTUARY

Two principles determine the intensity of our scrutiny in this appeal. First, the Federal Rules of Civil Procedure erect a powerful presumption against rejecting pleadings for failure

to state a claim. Rule 8 fosters that policy by sweeping aside the hypertechnical pleading rules that once defeated many an unwary but meritorious claimant; it requires nothing more than a plain recitation of the facts that a party believes entitles her to relief. Thus, although Rule 12(b)(6) authorizes prompt dismissal of claims where the party's belief proves mistaken, its sanction extends only to a formal testing of the legal sufficiency of the factual basis the pleader asserts in support of her claim. In reviewing such a dismissal, we accordingly have no license to question the truth of factual allegations, e.g., Trupiano v. Swift & Co., 755 F.2d 442, 443 (5th Cir. 1985), and must reverse "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief,"

Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 102, 2 L. Ed.2d 80 (1957).

The Rules also command judicial solicitude for parties who have tried but have not completely succeeded in stating a claim. Rule 15 thus authorizes amendments that seek, among other things, to cure pleading defects.[3] The Rule

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[3]. Before 1963, some federal courts refused to allow a plaintiff to cure her failure to state a claim by submitting a supplemental complaint. 6 C. Wright & A. Miller, Federal Practice and Procedure § 1505 (1971). An amendment to Fed. R. Civ. P. 15(d), however, authorized such additional pleading "even though the original pleading is defective in its statement of a claim for relief or defense."

nonetheless requires a finding that justice demands allowing the amendment, and our review of a denial of a motion to amend reflects recognition that making that determination rests within the sound discretion of the district court. We may overturn such a denial only when the district court abuses that discretion. E.g., Gulf Oil Trading v. M/V Caribe Mar, 757 F.2d 743, 751 (5th Cir. 1985); Daly v. Sprague, 742 F.2d 896, 900 (5th Cir. 1984).

III. MICROCHIP, MICROCHIP!

To survive a motion to dismiss, a pleading that raises a section 1983 claim must allege both that someone violated a right that the Constitution or laws of the United Sates secures and that the offender did so under color of state law. E.g., Parratt v. Taylor, 451 U.S. 527, 535, 101 S. Ct. 1908, 1913, 68 L. Ed.2d

420 (1981); Roberts v. Louisiana Downs, 742 F.2d 221, 223 (5th Cir. 1984). The district court dismissed the claims against Stream and M.G.S. because it determined that Auster's original complaint failed sufficiently to allege either element. As we read the complaint, however, the allegations that appellees acted "in concert" with a State Police Trooper and that the microchip operation constituted an unlawful search and seizure sufficed to state a section 1983 claim.

A. *Trooper's Pay*

The "under color of state law" element requires some manner of state responsibility for the acts that underlie the section 1983 claim. Nominally private conduct constitutes "state

action"[4] if the connection between the state and the acts justifies treating the private actor as an agent of the state or otherwise warrants attributing her behavior to the state. Louisiana Downs, 742 F.2d at 224. In particular, a private party acts under color of state law if her behavior makes her a "willful participant in joint action with the State or its agents." Adickes v. S.H. Kress & Co., 398 U.S. 144, 152, 90 S. Ct.

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4. While "state action" and "under color of state law" represent theoretically distinct ideas, "the two concepts are treated as co-extensive for purpose of determining jurisdiction under § 1983," Roberts v. La. Downs, 742 F.2d 221, 223 n.2 (5th Cir. 1984), and we use the phrases interchangeably in this opinion.

1598, 1606, 26 L. Ed.2d 142 (1970); Phillips v. Vandygriff, 711 F.2d 1217, 1225-26 (5th Cir. 1983) (citing Adickes), reh'g granted in part, 724 F.2d 490 (5th Cir.) (per curiam), cert. denied, ___ U.S. ___, 105 S. Ct. 94, 83 L. Ed.2d 40 (1984); Earnest v. Lowentritt, 690 F.2d 1198, 1200 (5th Cir. 1982) (quoting Adickes). We believe that the original complaint alleged facts that would at a minimum support a finding that Stream and M.G.S. acted under color of state law.

The district court nonetheless construed the complaint to allege only that appellees induced but did not themselves engage in action under color of state law. In so holding, the court relied on decisions establishing that a private party does not act under color of state law when she merely elicits but does not join in an exercise of official

state authority.[5] None of those cases conflicts with our holdings here for each

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5. The court citcd Hernandez v. Schwegmann Bros. Giant Supermarkets, 673 F.2d 771 (5th Cir. 1982) (per curiam) (affirming directed verdict on ground of no action under color of state law where evidence showed only that private merchant detained person he suspected of shoplifting pending arrival of police); Tarkowski v. Robert Bartlett Realty, 644 F.2d 1204 (7th Cir. 1980) (upholding dismissal of complaint alleging that private party induced state officials to discriminate in enforcing zoning ordinances); White v. Scrivner Corp., 594 F.2d

involved circumstances in which a private individual did no more than prompt agents of the state to use the power the state gave them. In this case, Auster alleged that appellees did far more than request official intervention and then await the result from the sidelines. The complaint

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140 (5th Cir. 1979) (affirming judgment after bench trial where evidence did not show joint action between police and private merchant in latter's detention and search of potential shoplifter); and Grow v. Fisher, 523 F.2d 875 (7th Cir. 1975) (upholding dismissal of complaint because private parties' inducing state officials to bring criminal charges did not amount to action under color of state law).

asserted, on the contrary, that appellees not only prompted the State Police to action but jointly planned and jointly executed the microchip operation with Trooper Martin under color of his official authority. We thus hold that the original complaint alleged action under color of state law sufficient to survive a motion to dismiss.

B. *As the Wells Lay Pumping*

Auster's original complaint alleged that the microchip operation deprived it of property without due process of law and violated its "constitutional rights in privacy and to be free from unlawful searches and seizures." The district court found the allegations deficient in two respects. It first determined that the lease agreement entitled appellees "to be present on the leased premises" and thus to conduct the microchip

operation. "Given this right", the court reasoned, "there could be no deprivation of Auster's right to privacy, even if such right is cognizable in this court." The court then concluded that the existence of an adequate state remedy for the property damage of which Auster complained "foreclosed the plaintiff's § 1983 complaint of deprivation of property without due process of law".[6] We hold

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6. The district court based this part of its holding on decisions that applied Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908, 68 L. Ed.2d 420 (1981), where the Court held that State remedies for damage to property satisfy the requirements of due process. We pretermit the question of the court's dismissal of Auster's due process claim.

that the complaint sufficiently alleged an unreasonable search and an unreasonable seizure.

The Fourth Amendment prohibits only those unreasonable searches and seizures that the government or its agents execute. The amendment condemns a search or seizure as unreasonable unless "the community's need for evidence surmounts a specified standard, ordinarily 'probable cause.'" Winston v. Lee, ___ U.S. ___, ___, 105 S.Ct. 1611, 1616, 84 L.Ed.2d 662 (1985). Indeed, carrying out a search and seizure without a prior judicial determination of probable cause requires a presumption of unreasonableness. See, e.g., United States v. Karo, ___ U.S. ___, ___, 104, S. Ct. 3296, 3304, 82 L. Ed.2d 530 (1984) ("Warrantless searches are presumptively unreasonable . . . ."); United States v. Jacobsen, ___ U.S. ___,

___, 104 S. Ct. 1652, 1657, 80 L. Ed.2d 85 (1984); Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed.2d 576 (1967). Not all government intrusions, even unreasonable ones, however, trigger Fourth Amendment protections; they must constitute a "search" or a "seizure". As the Supreme Court has defined those terms:

> A "search" occurs when an expectation of privacy that society is prepared to consider reasonable is infringed. A "seizure" of property occurs when there is some meaningful interference with an individual's possessory interest in that property.

Jacobsen, ___ U.S. at ___, 104 S. Ct. at 1656, Karo, ___ U.S. at ___, 104 S. Ct. at 3302 (quoting Jacobsen). With these principles in mind, we do not hesitate in holding that the original complaint stated claims under the Fourth Amendment.

Auster alleged facts supporting the conclusion that the microchip operation entailed "meaningful interference with" the company's possessory interests in property and thus constituted a "seizure" of that property. Auster claimed an exclusive right under the operating agreement to operate the production facilities, including the wells, pipelines, and their appurtenances.[7] An

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7. Stream contends that the Louisiana Mineral Code rather than the operating agreement governed her right to conduct "operations" on the lease property and that the Code gave her authority to execute the microchip operation. She grounds the argument on the allegation that she did not sign the operating agreement and on the conclusion that the agreement thus

did not bind her. We neither address nor decide the question because, as we have noted, we must accept as true Auster's allegation that it enjoyed the exclusive right to operate the lease and its facilities. In any event, the record at least suggests that Stream acquiesced in Auster's role as exclusive operator in that she apparently did not object to the company's performing that function over a period of some years. The operating agreement thus may bind her despite her failure to execute it. We reject her argument that the Mineral Code authorized the microchip operation, infra.

exclusive right to operate necessarily implies an exclusive right to possess; one cannot operate oil and gas production facilities without possessing them. The complaint also amply alleged that appellees significantly intruded upon Auster's possessory interests. It stated that appellees disassembled pipelines, placed screens in them, turned valves to halt the flow of oil, and took apart the choke assemblies of the M-1 and J-8 wells. Appellees thus exercised "dominion and control . . . for their own purposes" over property in which Auster enjoyed a possessory interest, and their behavior thus "clearly constituted a 'seizure'" under Auster's allegations. Jacobsen, ___ U.S. at ___ n. 18, 104 S. Ct. at 1660 n. 18.

Auster also sufficiently alleged a search. Auster had a legal right to

control the course over which it routed the transmission of oil and gas as part of its operational rights and responsibilities. Appellees point us to no law that compelled Auster to direct the flow over a particular route or one that made deviation from such a route illegal and, hence, illegitimate for purposes of the Fourth Amendment. See Jacobsen, ___ U.S. at ___, 104 S. Ct. at 1662 (holding that illegality of cocaine possession rendered illegitimate any expectation that nature of substance would remain private after government lawfully obtained it). Thus, although Auster's property rights do not control the inquiry,[8] we cannot say in the absence of evidence that the company

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8. See, e.g., Oliver v. United States, ___ U.S. ___, ___, 104 S. Ct. 1735, 1744, 80 L.Ed.2d 214 (1984)("'[E]ven

harbored no legitimate, reasonable expectation that the route it had chosen would remain private. We do not doubt, moreover, that the microchip operation infringed Auster's arguable expectation of privacy; the defendants planned and executed the operation solely to trace the course of the oil flow and thus to determine whether Auster had diverted production from metering equipment. Such

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a property interest in premises may not be sufficient to establish a legitimate expectation of privacy with respect to particular items located on the premises or activity conducted thereon.'") (quoting Rakas v. Illinois, 439 U.S. 128, 143 n. 12, 99 S. Ct. 421, 430 n. 12, 58 L. Ed.2d 387 (1978)).

monitoring, when it infringes a legitimate expectation of privacy, constitutes a search. See Karo, ___ U.S. at ___, 104 S. Ct. at 3304 (finding an unreasonable search in government's warrantless monitoring of beeper inside package to interior of house). Accepting Auster's allegations as true, we read the original complaint as sufficiently asserting that appellees searched Auster's production facilities.

Nor do we find deficient Auster's allegations regarding the reasonableness of appellees' alleged invasion of the company's property and privacy interests. As we have said, that appellees proceeded without a warrant compels a presumption of unreasonableness. The presumption alone discharges Auster's burden of pleading the unreasonableness of the alleged search and seizure. In a

event, Auster's factual allegations established its right to undertake to produce evidence at trial demonstrating unreasonableness. Assessment of the reasonableness of conduct involves balancing "the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion." United States v. Place, 462 U.S. 696, 703, 103 S. Ct. 2637, 2642, 77 L. Ed.2d 110 (1983); Jacobsen, ___ U.S. at ___, 104 S. Ct. at 1662-63 (quoting Place). In this case, Auster alleged that the microchip operation entailed extensive tampering with production facilities. We may reasonably infer that the operation lasted a significant period of time, see Place, 462 U.S. at 707, 103 S. Ct. at 2645 (holding seizure unreasonable due to length of detention of property), that

damage to production facilities permanently deprived Auster of property, cf. Jacobsen, ___ U.S. at ___, 104 S. Ct. at 1662 (noting greater intrusiveness upon Fourth Amendment interests where post-seizure field test of cocaine "converted . . . a temporary deprivation of possessory interests into a permanent one"), and that the use of the microchips in the wells and pipelines impinged significantly upon the integrity and functioning of the production facilities. The original complaint thus alleged more than that "the infringement was de minimis and constitutionally reasonable." Id. at ___, 104 S. Ct. at 1663. It stated a claim of unreasonable search and unreasonable seizure.

Appellees nonetheless assert that Auster could not have reasonably expected privacy because their lease agreement

with Auster as well as the Louisiana Mineral Code authorized them to conduct the microchip operation. We believe neither the contract nor the Code reached so far. The lease provided that Stream or her "representatives shall have access at all times to the premises for the purpose of observing all operations hereunder . . . ." We read the provision to authorize just what it purports to authorize--"observation" of operations. We do not interpret it, contrary to appellees' contentions, to entitle appellees surreptitiously to intrude physically upon those operations by dismantling choke assemblies and pipelines, shutting off the flow of oil, injecting foreign objects into the production equipment, and damaging the facilities and possibly the substrata. Certainly the lease allowed appellees to enter upon the premises and to look

around, but it did not confer *carte blanche* to interfere with Auster's operations. The lease simply did not negate Auster's expectation of privacy or its possessory interest in the production facilities.[9]

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9. We note sua sponte that the district court's receipt of and reliance upon material outside the complaint meant that it should have converted the Rule 12(b)(6) motion for dismissal and observed the procedural requirements that Rules 12(b) and 56 prescribe. See Fed. R. Civ. P. 12(b) (last sentence), 56(c). The court's failure to do either raises two distinct issues. The first concerns the notice and hearing requirements of Rule 12(b) and Rules 56. Although the record does not

indicate that the court gave the parties notice of its intention to consider matter outside the complaint and to render judgment on the merits, the parties "neither objected below nor raised before us the spectre of an inadequate hearing." Batiste v. Burke, 746 F.2d 257, 259 n.2 (5th Cir. 1984). They have thus waived any objection to the court's manner of proceeding. Id. The second question involves our standard of review. Where "a district judge grants a motion styled a motion to dismiss, but bases his ruling on facts developed outside the pleadings, . . . the appellate court will review the order under the standards laid down in Fed. R. Civ. P. 56." Estate of Smith v. Tarrant County

The Louisiana Mineral Code warrants a like conclusion. Appellees rely on a provision that restricts the ability of mineral lease co-owners to operate production facilities on the lease. The statute provided in relevant part:

> A co-owner of the lessee's interest in a mineral lease may not independently conduct operations or, except as provided in this article and Article 171, deal with the interest without the consent of his co-owner. He may act to

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Hosp. Dist., 691 F.2d 207, 208 (5th Cir. 1982) (footnote omitted); see Geiger v. United States, 707 F.2d 157, 160 (5th Cir. 1983) (citing Estate of Smith). We need not scrutinize afresh the record in this case to conclude that appellees have not satisfied that standard. As our discussion of the issues shows, ample questions of material fact remain for trial.

> prevent waste, destruction, or termination of the lease and to protect the interest of all, but cannot impose upon his co-owner liability for any costs or expenses except out of production.

La. Rev. Stat. Ann. § 31:177 (West 1975) (emphasis supplied). We see nothing in the statute authorizing appellees to interfere physically with the facilities Auster used to produce oil and gas. On the contrary, the language sanctioning actions to prevent waste merely qualified the general prohibition, in the preceding sentence, against a co-owner's independently conducting operations without the other co-owners' consent. Acting "to prevent waste" thus involves conducting independent operations regardless of co-owners' permission with a view to avoiding unnecessary loss of oil or gas, as where a co-owner takes it upon herself to drill a well to protect against drainage by an adjoining

landowner. The statute did not authorize appellees to interfere with Auster's operations, but rather to conduct their own if necessary "to prevent waste". It thus did not negate Auster's possessory interest or expectation of privacy in the production facilities. Cf. Wheeler v. Cosden Oil and Chemical Co., 734 F.2d 254, 257 (5th Cir.) (finding that lease owners consented to search of oil lease by accepting lease subject to state statutes authorizing state officials to enter and search mineral leases), modified on reh'g 744 F.2d 1131 (5th Cir. 1984).

IV. THE UNVANQUISHED

Two months after the district court dismissed its claims against appellees, Auster sought to cure the deficiencies the court had found in its allegations of state action and constitutional

deprivation. The amended complaint Auster offered expressly asserted that the defendants had lacked probable cause to search and seize. It also added allegations that appellees' agents had principally controlled and physically executed the microchip operation, that State Police troopers had patrolled the perimeter of the lease property to maintain a lookout during the operation, and that Trooper Martin documented the insertion and monitoring of the microchips. The new allegations, Auster argued, repaired any shortcomings in its original complaint. The district court nonetheless denied the motion to amend without opinion.

As we have indicated, Rule 15(a) requires the district court to allow amendments "freely . . . when justice so requires", and we may overturn its denial

of a motion to amend where it has abused its discretion in fathoming the dictates of justice. We find such an abuse here. Auster sought the amendment just six months after it filed this action, it had diligently sought discovery in both state court and these proceedings, and it asked for amendment promptly upon discovering the basis for new allegations. Appellees thus cannot claim prejudice due to untimeliness of Auster's motion or any delay it might cause. See, e.g., Harvey v. Andrist, 754 F.2d 569, 571 n. 1 (5th Cir. 1985) (upholding refusal to allow amendment where motion filed ten weeks before trial); Earlie v. Jacobs, 745 F.2d 342, 345 (5th Cir. 1984) ("[T]he court may consider whether the amendment would cause undue delay in the proceedings [or] undue prejudice to the non-movant . . . ."); Daly v. Sprague, 742 F.2d 896, 900 n.6 (5th Cir. 1984) (noting relevance of

"timeliness of the amendment with regard to the progress of the case as a whole"). Nor does the record support a finding that Auster requested the amendment to achieve a tactical advantage or otherwise in bad faith. See Earlie, 745 F.2d at 345; Engel v. Teleprompter, 732 F.2d 1238, 1242 (5th Cir. 1984) ("Leave to amend may be denied if a likelihood of prejudice or some other procedural abuse is shown."). That Auster endeavored chiefly to correct any flaws in its original statement of its claims and did not seek to allege new causes of action also cuts in favor of holding that justice requires allowing the amendment. See Daly, 742 F.2d at 900 n.6 (stating that appropriateness of amendment depends in part on "the germaneness of the subject matter of the amendment to the subject matter of the suit"). We now so

hold; the district court should have allowed the amendment.

We recognize that the amendment will not affect the adequacy of the original complaint, which we have upheld as sufficient in itself. The new allegations will nonetheless more precisely define the factual basis that Auster asserts in support of its claims. Especially since appellees have yet to file answer, it will thus serve the salutary purpose of narrowing the focus in dispute.

V. THE END

The original complaint stated claims under the Fourth Amendment, and Auster presented more than adequate grounds for securing leave to amend that complaint. We accordingly vacate the district

court's judgment against Auster and remand the case with instructions to allow Auster to amend its complaint.

VACATED AND REMANDED WITH INSTRUCTIONS.

APPENDIX G

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF LOUISIANA LAKE CHARLES DIVISION

AUSTER OIL & GAS, INC.

versus CIVIL ACTION NO. 83-3180

MATILDA GRAY STREAM, et al

MEMORANDUM RULING

Pending for determination are motions on behalf of two defendants, Matilda Gray Stream ("Stream") and M. G. S. of Lake Charles, Inc. ("M. G. S."), which seek to have this matter dismissed and to have certain portions of the original complaint stricken from the record. The plaintiff, Auster Oil & Gas, Inc. ("Auster"), has filed oppositions to both

motions. For reasons set forth below, the motion to dismiss is GRANTED, and the motion to strike is, therefore, MOOT.

1. INTRODUCTION:

The facts surrounding this dispute involve oil and gas operations on a tract of land located in Calcasieu Parish, Louisiana ("leased property"). In August 1971, Stream was the owner of the mineral rights associated with the leased property. On August 10, 1971, she granted an oil, gas and mineral lease ("1971 lease") to several lessees. Through several transactions, operating rights were acquired on the lease by Auster and several other co-lessees. Original Complaint, Paragraph 8. When the events giving rise to this lawsuit occurred, Stream was the lessor retaining a 25 per cent royalty interest in the mineral rights, and Auster was the

exclusive operator of drilling efforts on the leased property. Additionally, Stream owned a 10 per cent working interest in one of the wells on the lease, the M-1 Well.

According to the complaint, during the spring and summer months of 1983, Stream, acting through her agent, Edward M. Carmouche, retained a private investigator to look into alleged oil thefts in the Ged Field where the leased property is located. Auster specifically alleges in its complaint: "During the same period of time, Edward M. Carmouche, on behalf of . . . Matilda Gray Stream, was in contact with various Louisiana State Police officials regarding an investigation of alleged oil thefts in the Ged Field." Id., Paragraph 24.

Auster asserts that Carmouche and the private investigator traveled to Oklahoma

and purchased plastic microchips to be used in investigating the possible oil thefts. Subsequently, Auster[1] alleges that Carmouche and several other individuals met with Louisiana State Police detective Al Martin to plan a covert operation to insert the microchips into certain oil wells operated by Auster. According to the complaint, on September 25, 1983, Martin and alleged agents of Stream entered the leased property and inserted the microchips into the M-1 Well and the J-8 Well, both wells being operated by Auster. Sometime later, representatives of Auster discovered the chips in pipelines leading from these two wells.

Auster alleges that the insertion of the microchips constituted an illegal search and seizure and a violation of its rights to privacy. Auster seeks recovery

for property damage allegedly caused by the insertion of the microchips and punitive damages because of the outrageous nature of the defendants' behavior. Auster bases its 42 U.S.C. § 1983 claims against Stream and her corporation on an allegation that her agents participated in planning the insertion of the microchips into the wells, and acted jointly and in concert with Martin, a Louisiana State Police officer.

Stream and M. G. S. have filed a motion to dismiss pursuant to Rule 12(b)(6), Federal Rules of Civil Procedure, asserting that Auster has failed to state a claim for which relief can be granted. Specifically, Stream argues that "state action" which is required for liability of a private party under 42 U.S.C. § 1983 is absent in this

case. Additionally, Stream asserts that she and her representatives had a contractual right as lessor to be present on the leased property arising from the specific provisions of the 1971 oil and gas lease. A complete review of the record and the controlling jurisprudence makes it clear that Stream's position is correct.

LEGAL ANALYSIS:

A. Motion to Dismiss

Stream submits that Auster's complaint should be dismissed since it fails to set forth a claim which would entitle Auster to recovery against private defendants in a § 1983 case. The standard for granting a motion to dismiss pursuant to Rule 12(b) was reiterated by the Fifth Circuit in Sisk v. Texas Parks and Wildlife Department, 644 F.2d 1058

(5th Cir. 1981). In Sisk, the court stated:

> A complaint should not be dismissed under Rule 12(b)(6) for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no st of facts which would entitle him to relief.

644 F.2d at 1059; see also, Hogan v. Midland County Commissioner's Court, 680 F.2d 1101 (5th Cir. 1982). A Rule 12(b)(6) motion to dismiss attacks the pleadings of the plaintiff. In considering a mction to dismiss, the district court accepts as true the factual allegations of the plaintiff's complaint. Burgess v. City of Houston, 718 F.2d 151, 153-54 (5th Cir. 1983).

In order to determine whether Auster has asserted a compensable claim under § 1983, the complaint must be examined in search of two critical factual allegations. The Fifth Circuit restated

the nature of the district court's inquiry upon a motion to dismiss in Staton v. Wainwright, 665 F.2d 686 (Cir. 1982):

> Our initial inquiry focuses on whether the two essential elements of a section 1983 action are present: first, whether the conduct complained of was committed by a person acting under color of state law; and, second, whether this conduct deprived plaintiff of rights, privileges or immunities secured by the Constitution or laws of the United States.

665 F.2d at 687. See also, Burgess, supra, at 154. Since Auster's complaint alleges a constitutional deprivation by private parties, special analysis must be made of the complaint. The problems of asserting a § 1983 claim against a private party were discussed in the United States Supreme Court case of Adickes v. S. H. Kress & Co., 398 U.S. 144, 90 S.Ct. 1598 (1970). In Adickes, the Court noted:

> [T]he Fourteenth Amendment plainly prohibits a state itself from discriminating because of race. On the other hand, § 1 of the Fourteenth Amendment does not forbid a private party, not acting against a backdrop of state compulsion or involvement, to discriminate on the basis of race in his personal affairs as an expression of his own personal predelictions. . . . § 1 of [the Fourteenth Amendment] erects no shield against merely private conduct, however discriminatory or wrongful.

398 U.S. 169, 90 S. Ct. at 1614-15 (emphasis added).

Thus, § 1983 does not reach all constitutional injuries, but only those caused by persons acting under color of state law, that is, "state action." Earnest v. Lowentritt, 690 F.2d 1198, 1200 (5th Cir. 1982). Only where the action of a private party infringes upon some property or liberty interest will § 1983 jurisdiction and relief be appropriate. Fulton v. Hecht, 545 F.2d 540, 542 (5th Cir. 1977). Actions by a

private party can only be characterized as "state actions" when the action of a party, apparently private, may be fairly attributable to the state. Jackson v. Metropolitan Edison Company, 419 U.S. 345, 95 S. Ct. 449 (1974).

1. State action

It is obvious that activities by persons who are not actually state officials cannot be directly characterized as "state action." However, the Supreme Court has set forth a number of tests for determining whether private action can be attributable to the state. Among these tests are the "public function" test, Marsh v. Alabama, 326 U.S. 501 (1946); the "nexus" test, Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961) and Jackson v. Metropolitan Edison Co., supra; and the "joint

participation" test, Adickes v. S. H. Kress & Co., supra.

A review of the record in this case makes it clear that the only potential source of § 1983 for the private party defendants would be the "joint participation" test. There is no allegation that the state abdicated its police function to the private defendants as required in the "public function" test. Additionally, there is no support for an argument that the normal business operations of the private defendants were so closely intertwined that they took on the identity of the state as required in the "nexus" test. For a private party to incur § 1983 liability under the "joint participation" test, the individual must be a "willing participant in joint action with the State or its agents." Earnest v. Lowentritt, supra; see also, Dennis V.

Sparks, 449 U.S. 24, 101 S.Ct. 183 (1980).

There is no doubt that Auster's complaint specifically alleges that Stream's agent were willing participants with Martin, a state police officer, in planning the investigation of alleged oil thefts in Calcasieu Parish. However, it must be determined if the participation of a private party in a police investigation, particularly when that private party is a complaining witness, can be defined as a "state action" to deprive the subject of the investigation of Fourth Amendment or privacy rights. It is clear in the Fifth Circuit that merchants who apprehend and detain shoplifters suspected of criminal activity are not acting under color of state law when police officials actively take part, and ultimately control, the

investigation. White v. Scrivner Corp., 494 F.2d 140 (5th Cir. 1979); Hernandez v. Schwegmann Brothers Giant Supermarkets, 673 F.2d 771 (5th Cir. 1982).

In the very instructive Seventh Circuit case of Tarkowski v. Robert Bartlett Realty Co., 644 F.2d 1204 (7th Cir. 1980), the court affirmed the dismissal of a § 1983 complaint which alleged that the private parties acted jointly with a state official in discriminatorily enforcing zoning ordinances. The court stated:

> [A] private person is not engaged in state action when he merely lodges a complaint with the police the prosecutor or when he invokes the exercise of judicial authority. . . . A private person does not conspire with a state official merely by invoking an exercise of the state official's authority.

644 F.2d 1206 and 1208. [six; correct citation is 644 F.2d at 1208; see 644 F.2d at 1206.]

In another Seventh Circuit case, Grow v. Fisher, 523 F.2d 875 (7th Cir. 1975), the court affirmed the dismissal of a § 1983 complaint alleging that complaining witnesses acted in concert with state officials in instituting and prosecuting criminal charges for assault. The court stated:

> While some of the acts charged against the individual defendants would be tortious in nature, none is sufficient to show that they were done under color of law or that any of plaintiff's constitutional rights were violated thereby. The only action of any of the defendants which was under color of law was with relation to the prosecutions. There is no allegation to support a basis for a claim that the individual defendants had any control over the prosecution of the case against [the plaintiff] or the failure to prosecute the action in which he was a complainant. That control was vested by law in the prosecuting official. The mere fact that the individual defendants were

> complainants and witnesses in action [sic] which itself was prosecuted under color of law does not make their complaining or testifying other than what it was, i.e., the action of private persons not acting under color of law.

523 F.2d 879. It is noteworthy that the Seventh Circuit observed that the plaintiff in Grow failed to allege specifically why there was no reasonable basis for proceeding with the criminal investigation and prosecution. Id.

As noted above, Auster's complaint specifically states that there was suspected theft of oil occurring in the Calcasieu Parish area. The complaint also asserts that Carmouche, as Stream's agent, was in regular contact with Louisiana State Police officials concerning the investigation of the suspected theft of oil. Auster's complaint makes absolutely no allegation that either Stream's agents or the

Louisiana police officials had no cause to believe criminal activity was occurring in Calcasieu Parish. Likewise, there is no allegation in Auster's complaint that the criminal investigation carried out by Martin with the aid of Stream's agents was arbitrary and capricious, or not based on reliable information that criminal activities were occurring. The only allegation relating to the reasonableness of the police investigation concerns an assertion that no warrant was secured before Martin and Stream's agents entered the lease property and inserted the microchips into the oil pipeline.

Auster's factual assertions concerning the activities of Stream's agents in relation to the police investigation of suspected oil theft in Calcasieu Parish is insufficient to

constitute "state action" under the federal jurisprudence. When all of Auster's factual allegations are taken as true, the only reasonable conclusion possible is that Stream's agents were participating in a valid criminal investigation controlled by Louisiana State Police officials. Thus, Auster fails to allege the requisite "state action" to set forth a compensable claim against Stream and M. G. S. under § 1983.

2. Constitutional deprivation

Even if the activities of Stream's agents could be determined to be "state action," the harms complained of in Auster's allegations do not rise to a constitutional level. Essentially, Auster argues that its rights to privacy were violated by the unwarranted search of the lease premises and the insertion of the microchips into the oil pipelines

running from the M-1 and J-8 wells. Auster asserts that this improper behavior on the part of Martin and Stream's agents caused substantial property damage to the wells.

In support of its opposition to the motion to dismiss, Auster has submitted a copy of the 1971 oil and gas lease. Cursory review of the provisions of the 1971 lease makes it clear that Stream and her representatives had a contractual right to enter the leased property at any time to observe operations. Specifically, § VII provides:

> [b] Lessor or lessor's representatives shall have access at all times to the premises for the purpose of observing all operations hereunder, and shall have access also, at all reasonable times, to lessee's books and records showing production of oil, gas or other minerals from the leased lands.

Oil, Gas and Mineral Lease dated May 3, 1971. Under the terms of the 1971 lease,

Stream is the lessor of the leased property. Additionally, as set forth in Auster's complaint, Stream is the owner of a 10 per cent working interest in the M-1 Well. She also owns a 25 per cent royalty interest in the entire lease. Simply put, Stream and her representatives had a legal right to be present on the leased premises. Given this right, there could be no deprivation of Auster's right to privacy, even if such right is cognizable in this court.

Auster makes claims for substantial property damage resulting from the activities of Martin and Stream's representatives as a result of the insertion of the microchips into the oil pipelines. The Fifth Circuit made the following observation concerning constitutional deprivations in § 1983

cases in Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981):

> The first inquiry in any § 1983 suit . . . is whether the plaintiff has been deprived of a right secured by the Constitution and laws. . . . Section 1983 imposes liability for violations of rights protected by the Constitution, for violations of duties of care arising out of tort law.

634 F.2d 265. The Fifth Circuit made a similar observation in the very recent case of Villanueva v. McInnis, 723 F.2d 414 (5th Cir. 1984):

> We note that § 1983 neither provides a general remedy for alleged tort of state officials nor opens the federal courthouse doors to relieve the complaints of all who suffer injury at the hands of the state or its officers..... It reached no further than deprivation of a federally protected or constitutionally secured right or privilege.

723 F.2d at 418.

The only way that Auster could recover property damage to the wells in this case would be in the absence of due

process under Louisiana law. It is well established that the existence of an adequate state remedy forecloses recovery for tortious property damages under § 1983. As noted in Burgess v. City of Houston, supra.

> The existence of an adequate state remedy to address property damage inflicted by state officers avoids the conclusion that there has been any constitutional deprivation of property without due process of law.

718 F.2d at 155. In Burgess, the Fifth Circuit determined that the plaintiff could recover unlimited property damages in the Texas state courts for the alleged negligent acts by the defendant. The existence of this potential remedy foreclosed the plaintiff's § 1983 complaint of deprivation of property without due process of law.

As in Burgess, Auster has an adequate state remedy in the courts of Louisiana.

In fact, as noted in the record, Auster has instituted state proceedings against Stream and her agents seeking damages under several theories. Not only does Auster have an adequate state remedy under Louisiana state law, it is presently seeking to take advantage of that remedy.

3. Summary:

To summarize: Auster has failed to set forth a compensable claim under § 1983 against Stream or M. G. S. The requisite "state action" on the part of the private defendants is absent in this case. There are no factual allegations sufficient to establish an intentional deprivation of established constitutional rights. Auster is provided an adequate state remedy in the courts of Louisiana. Therefore, the motion to dismiss must be GRANTED.

B. Motion to Strike

Stream has filed a motion to strike certain allegations st forth in Paragraph 51 of the original complaint. The dismissal of Auster's complaint against Stream and M. G. S. renders the motion to strike MOOT. Even if the motion was not moot, however, the allegations contained in Paragraph 51 are logically relevant to the facts alleged by Auster, and cannot be characterized as scandalous or, otherwise, repugnant. Rule 12, F.R.C.P. Therefore, the motion to strike must be DENIED.

III. CONCLUSION:

For the reasons set forth above, the motion to dismiss on behalf of Matilda Gray Stream and M. G. S. of Lake Charles, Inc. is GRANTED, and the complaint of Auster Oil & Gas, Inc. against these

defendants is DISMISSED. The motion to strike by these defendants is DENIED. An Order consistent with this Memorandum Ruling will issue herewith.

THUS DONE AND SIGNED at Shreveport, Louisiana, this 17th day of April, 1984.

/s/ TOM STAGG

CHIEF JUDGE

APPENDIX H

U.S.C. Const. Amend. IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

42 U.S.C.

§ 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or

causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (R. S. § 1979; Dec. 29, 1979, P. L. 96-170; § 1, 93 Stat. 1284.)

La. Rev. Stat. Ann. § 30:4(B)

The commissioner shall make such inquiries as he thinks proper to determine whether or not waste, over which he has jurisdiction, exists or is

imminent. In the exercise of this power the commissioner has the authority: to collect date; to make investigations and inspections; to examine properties, leases, papers, books and records; to examine, survey, check, test, and gauge oil and gas wells, tanks, refineries, and modes of transportation; to hold hearings; to provide for the keeping of records and the making of reports; and to take any action as reasonably appears to him to be necessary to enforce this Chapter.

La. Rev. Stat. Ann. § 31:7

When minerals reduced to possession

Minerals are reduced to possession when they are under physical control that permits delivery to another.

Comment

In view of changing technology and the wide variety of possible mining methods for different substances, Article 7 does not attempt to determine the point in time or space at which minerals are reduced to possession. It provides only that possession is had when delivery to another becomes possible. Insofar as oil and gas are concerned, the jurisprudence construing the severance tax laws indicates a generally accepted view that severance occurs at the wellhead. See La. R.S. 47:634(3) (1950). Sartor v. United Carbon Co., 183 La. 287, 163 So. 103 (1936); United Gas Public Service Co., 186 La. 555, 173 So. 103 (1937); Texas Co. v. Fontenot, 200 La. 753, 8 So.2d 689 (1942); Wall v. United Gas Public Service Co., 178 La. 908, 152 So. 561 (1934); State ex rel. Boykin v. Hope

Producing Co., 167 So. 506 (La. App. 2d Cir. 1936). A few other cases contain vague language of some relevance. Dixon v. American Liberty Oil Co., 226 La. 911, 77 So.2d 533 (1955); Federal Land Bank of New Orleans v. Mulhern, 180 La. 627, 157 So. 370 (1934); Liles v. Texas Co., 166 La. 293, 117 So. 229 (1928); Breaux v. Pan American Petroleum Corp., 163 So.2d 406 (La. App. 3d Cir. 1964), writs refused, 246 La. 581, 165 So.2d 481. The severance tax cases, technically construed, deal with the question of who is the "owner" within the meaning of the severance tax laws at the time of severance. Although none of the decisions denies the possibility that possession might be had at another point in the extractive process for property law purposes, all of them are based on the common understanding that in the case of ordinary oil and gas operations

severance occurs, possession is taken, and ownership vests at the wellhead as to liquid and gaseous substances such as oil and gas. There is no reason why this common understanding should not be accepted, for, within the meaning of Article 7, this would ordinarily be the point at which possession is sufficient to deliver the substances to another.

Article 7 eschews further definition or another approach, such as defining possession as having occurred at the surface of the land or water where extraction takes place because new technology holds out the possibility of sufficient control being had at some point below ground or, for example, on the seabed. Thus, the court will be required to determine, considering the kind and character of mining operations in question and viewing the customs of

particular industries, the point at which one extracting minerals has possession.

The vesting of possession is of great importance for legal purposes. For a landowner extracting fugitive minerals, it will mark both the vesting of title and mobilization of the substance in question. In the case of solid minerals, the landowner is regarded by Article 5 as the owner of such substances, but vesting of possession will still determine when minerals extracted become subject to the law of movables. As to others than the landowner, vesting of possession will have the dual effect of marking the vesting of title and mobilization. Despite the fact that Article 5 recognizes that the owner of land also owns solid minerals, such minerals are insusceptible of ownership apart from the land, and the landowner may therefore

only convey or lease the right to explore for them and reduce them to possession and simultaneously to ownership. Accordingly, the nature of the substance involved has no impact on the significance of reduction to possession and consequent vesting of title.